

United States
Circuit Court of Appeals

For the Ninth Circuit. 6

—————
GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Appellant,

vs.

W. G. SHELLNBARGER,

Appellee.

—————
Transcript of Record.
—————

Upon Appeal from the United States District Court for the
District of Oregon.

—————
FILED

JUN 23 1931

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

CHARLES A. HART, FLETCHER ROCK-
WOOD, and CAREY, HART, SPENCER &
McCULLOCH, Yeon Building, Portland, Ore-
gon,

For the Appellant.

MALARKEY, DIBBLE & HERBRING, Yeon
Building, Portland, Oregon, and FRANK G.
SMITH, Porter Building, Portland, Oregon,
For the Appellee. [1*]

In the District Court of the United States for the
District of Oregon.

July Term, 1930.

BE IT REMEMBERED, that on the 30th day
of July, 1930, there was duly filed in the District
Court of the United States for the District of Ore-
gon, a transcript of record on removal from the
Circuit Court of the State of Oregon for Multnomah
County, the complaint therein being in words and
figures as follows, to wit: [2]

*Page-number appearing at the foot of page of original certified
Transcript of Record.

In the Circuit Court of the State of Oregon for the
County of Multnomah.

W. G. SHELLNBARGER,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and SPOKANE, PORTLAND
AND SEATTLE RAILWAY COMPANY, a
Corporation,

Defendants.

COMPLAINT.

Plaintiff for cause of action against defendants
alleges:

I.

At all times hereinafter mentioned defendant,
Great Northern Railway Company, was and still is
a corporation, organized and existing under the
laws of the State of Minnesota and defendant,
Spokane, Portland and Seattle Railway Company,
was and still is a corporation, organized and exist-
ing under the laws of the State of Washington.

II.

At all times hereinafter mentioned said defend-
ants were and still are engaged in the operation of
a transcontinental railway system extending from
Portland, Oregon, to various points in the East
and were and still are engaged, as common carriers
for hire and profit, in the business of transporting
passengers by means of steam railroad trains, owned
and/or controlled and/or operated by them.

III.

On July 12, 1928, a special train was made up by said defendants or one of them at Portland, Oregon, for the purpose of transporting members of a lodge or organization known as the "Knights Templar" to Detroit, Michigan, in which latter city a [3] triennial conclave of said lodge order was later to be held. Said special train was commonly known as and called the "Knights Templar Special."

IV.

Plaintiff who was at said time and still is a resident of said City of Portland, Oregon, and who intended to and was on his way to attend said conclave, purchased on said July 12, 1928, at said Portland, Oregon, from the agent of defendants or of said defendant, Spokane, Portland and Seattle Railway Company, a railway ticket, entitling him to transportation on said special train from said Portland, Oregon, to said Detroit, Michigan, and on the morning of said July 12, 1928, plaintiff boarded said special train at said Portland, Oregon and became and was a passenger thereon and entitled, as such, to be safely carried and transported to his said place of destination.

V.

Said special train proceeded to and arrived at Spokane, Washington, without incident. Upon the arrival of said special train at said Spokane and from there on eastward, for the balance of said contemplated journey, plaintiff has been informed and believes, and, therefore, alleges the fact to be

that said special train became and was a Great Northern Railway Company train and was controlled and operated from said Spokane on and up to and including the place where plaintiff was injured, as hereinafter alleged, by the said defendant, Great Northern Railway Company. Whether plaintiff's information with relation to which of said defendants was operating and responsible for the movements of said special train at the time and place of his said injury is correct or not plaintiff has no means at this time, of knowing, the said matter being peculiarly within the knowledge of defendants and, therefore, in the subsequent allegations of this complaint, with respect to the negligence, which the plaintiff claims occasioned [4] and caused his injuries, plaintiff charges such negligence against both and/or either one of said defendants.

VI.

On the evening of July 13, 1928, at about the hour of 10:30 P. M., while plaintiff was riding, as aforesaid, as a passenger on said special train and at a time when said train was entering upon or taking a siding, at or near the Town of Saco, in the State of Montana, and while plaintiff was in the act of walking forward on said train, in a careful and prudent manner, from the observation car of said train to a car ahead in which his berth was located, the plaintiff was, by reason of the carelessness and recklessness and negligence of the said defendants and/or one or both of them, acting by and through the agents and employees in charge of and operating said train, thrown and

hurled therefrom with great force and violence to the railway right of way and then and there and by reason of said carelessness and recklessness and negligence suffered and sustained the injuries hereinafter set forth.

VII.

The said throwing and hurling of plaintiff from said train resulted from and was solely occasioned and proximately caused by the carelessness and recklessness and negligence of said defendants and/or one or both of them, acting through said agents and employees in charge of said train, and in failing to exercise the high degree of care owing from a common carrier to its passengers, in the following particulars, to wit:

(1) Said train was carelessly and recklessly and negligently operated at a high and dangerous and excessive rate of speed in view of the fact that it was at the time of said occurrence approaching and about to enter upon and about to take a siding, and that in slowing down said train for the purpose of later entering said siding said train was so carelessly and negligently operated that it was thereby caused to sway and to [5] give an unusual and extraordinary and unnecessary and unduly violent lurch, thereby causing plaintiff to lose his balance and fall.

2. Said train was carelessly and recklessly and negligently suffered and permitted to be in an unsafe condition and dangerous to passengers, who might be in the act of passing from one car to another, in that the vestibule door and the steps on the car from which plaintiff was so thrown were al-

lowed to be and remain open and to be unguarded and unprotected and insufficiently and not properly lighted and in that said vestibule door and steps were open and allowed to be and remain open and exposed between stations at a time when said train was still in rapid motion and at an improper and unsafe place in said train and in that there was a failure and neglect to warn or notify plaintiff in any manner of the said open vestibule door and steps and of the danger of injury that might result therefrom.

VIII.

By reason of the said carelessness and recklessness and negligence plaintiff was thrown and hurled with great force and violence and thereby and in consequence thereof suffered and sustained a fracture of his skull and injuries to his brain and nervous system; his right shoulder-bone was chipped at the socket and he received a severe contusion at the base of the skull and his neck and the ligaments and muscles and tendons thereof were badly wrenched and injured and he then and there suffered a severe shock and was rendered sick and lame and sore and was bruised and lacerated in various parts of his body and person. By reason of the injuries so negligently inflicted upon him plaintiff's hearing has been impaired and he has ever since receiving the same suffered and still suffers from a dull pain over the region of the back of his head and by reason of the said brain injuries received by plaintiff and of the injuries to his nervous system plaintiff has been left in a morose and melancholy and nervous condition and suffers from lapses

[6] of memory and is unable to concentrate or remember and his ability to speak or to enunciate or articulate distinctly has been impaired and injured and his ability to walk has been affected, thereby causing him to walk with a shuffling and unsteady gait. Plaintiff was, prior to receiving said injuries, strong and vigorous and enjoying good health. By reason of all of the injuries so suffered and sustained by plaintiff his health and nervous system have been permanently injured and impaired and he has ever since receiving said injuries suffered and will continue to suffer great pain and mental anguish and he has by reason of the injuries so negligently inflicted upon him been permanently injured and damaged in the full sum of Fifty Thousand (\$50,000.00) Dollars.

IX.

By reason of the said injuries so negligently inflicted upon him plaintiff was necessarily confined in a hospital at Glasgow, Montana, undergoing medical and surgical care for a period of two weeks and later at the Good Samaritan Hospital in Portland, Oregon, for a period of about a month and half, and plaintiff has expended on account of hospital and nursing services the sum of Seven Hundred (\$700.00) Dollars. Plaintiff has been required to engage the services of physicians in an attempt to relieve his said injuries and is still consulting a doctor and receiving medical attention, and plaintiff has so far necessarily expended or become liable for, by way of doctor expense, the sum of Seven Hundred and Fifty (\$750.00) Dollars, and

has further expended the sum of Thirty (\$30.00) Dollars for examination of his eyes and for new glasses to replace those broken, and has lost in wages and earnings which he would otherwise have received the sum of Two Thousand (\$2,000.00) Dollars. The sums so expended or for which plaintiff is liable were and are the usual and customary charges for services of like kind and character and by reason of the facts set forth in this paragraph plaintiff has been [7] and is specially damaged in the further sum of Thirty-four Hundred and Eighty (\$3480.00) Dollars.

WHEREFORE, plaintiff prays for judgment against said defendants and each of them in the sum of Fifty-three Thousand and Four Hundred and Eighty (\$53,480.00) Dollars, and for his costs and disbursements herein incurred.

MALARKEY, DIBBLE & HERBRING, and
FRANK G. SMITH,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, W. G. Shellenbarger, being first duly sworn, depose and say that I am the plaintiff in the above-entitled cause; and that I believe the foregoing complaint to be true.

W. G. SHELLNBARGER.

Subscribed and sworn to before me this 11th day of July, 1930.

[Seal]

A. M. DIBBLE,

Notary Public for the State of Oregon.

My commission expires on July 1, 1932.

[Endorsed]: Filed July 11, 1930. A. A. Bailey, Clerk. H. E. Graham, Deputy.

Transcript of record filed in United States District Court, July 30, 1930. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [8]

AND AFTERWARDS to wit, on the 30th day of July, 1920, there was duly filed in said court an answer of defendant Great Northern Railway Company, in words and figures as follows, to wit: [9]

[Title of Court and Cause.]

ANSWER OF DEFENDANT GREAT NORTHERN RAILWAY COMPANY.

Defendant, Great Northern Railway Company, for answer to the complaint in the above-entitled case alleges:

I.

Admits the allegations of Paragraph I of the complaint.

II.

Answering Paragraph II of the complaint this defendant alleges that defendant, Spokane, Portland and Seattle Railway Company, operates a railway system extending from Portland, Oregon, to Spokane, Washington, and that defendant, Great Northern Railway Company, operates a line of railway extending from a connection with the railroad of defendant, Spokane, Portland and Seattle Rail-

way Company, at Spokane, Washington, to points in the State of Montana and east thereof in the states of North Dakota and Minnesota, and this defendant admits that both defendants are common carriers as alleged in the said Paragraph II.

III.

Admits the allegations of Paragraph III of the complaint. [10]

IV.

Admits the allegations of Paragraph IV of the complaint down to and including the word "thereon" in line 14 of page 2 of the complaint, but except as so admitted defendant denies the allegations of Paragraph IV of the complaint.

V.

Admits that after said train reached Spokane, Washington, and thereafter until said train had reached a point beyond the point where the alleged injuries to the plaintiff are alleged to have occurred, said special train was controlled and operated by this defendant as alleged in Paragraph V of the complaint.

VI.

Admits that on the evening of July 13, 1928, at or about the hour of 10:30 P. M., the plaintiff fell from said train to the defendant's right of way and that as a result of said fall plaintiff sustained certain injuries, as alleged in Paragraph VI of the complaint, but except as so specifically admitted defendant denies the allegations of said Paragraph VI.

VII.

Denies the allegations of Paragraph VII of the complaint.

VIII.

Admits that as a result of said fall plaintiff sustained certain personal injuries, the extent of which are to this defendant unknown, but except as so admitted defendant denies the allegations of Paragraph VIII of the complaint.

IX.

Admits that as a result of said injuries plaintiff was confined in a hospital at Glasgow, Montana, for a certain [11] period and there received medical and surgical care and that later plaintiff was confined at Good Samaritan Hospital in Portland, Oregon, for a certain period as alleged in Paragraph IX of the complaint. Defendant has no information sufficient to form a belief as to other facts alleged in said Paragraph IX and for that reason denies all of the other allegations contained in said Paragraph IX.

Further answering and as a separate defense defendant alleges that the fall from the said train and the injuries therefrom resulting to the plaintiff were caused solely by the contributory negligence of the plaintiff in that just prior to the time of said injuries an employee of this defendant in the regular discharge of his duties in connection with the operation of said train and in the exercise of due care for the safety of said train and the passengers thereon, had opened a certain vestibule door on one of the cars of said train, and said employee

was standing at said open door for the purpose of observing the movement of said train and assisting in the operation thereof, and that while said employee was standing in the opening at said door, without any warning to him and without any knowledge on the part of said employee of the intentions of the plaintiff, the plaintiff proceeded from the vestibule and fell to the ground and sustained certain personal injuries as a result of said fall. That said acts of the plaintiff were negligent and done without due care for his own safety and were the sole cause of said injuries.

WHEREFORE, this defendant demands that plaintiff take nothing by this action and that this action be dismissed [12] and that defendant have its costs and disbursements herein.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,
Attorneys for Defendant Great Northern Railway
Company.

State of Oregon,
County of Multnomah,—ss.

I, Fletcher Rockwood, being first duly sworn, depose and say that I am of attorneys for defendant, Great Northern Railway Company, in the above-entitled action; that I have read the foregoing answer, know the contents thereof, and that the same is true as I verily believe.

I further certify that this verification is made by me as attorney for defendant, Great Northern Rail-

way Company, for the reason that none of its officers are within the District of Oregon.

FLETCHER ROCKWOOD.

Subscribed and sworn to before me this 30th day of July, 1930.

[Seal]

PHILIP CHIPMAN,

Notary Public for Oregon.

My commission expires Aug. 28, 1931.

Filed July 30, 1930. [13]

AND AFTERWARDS, to wit, on the 7th day of August, 1930, there was duly filed in said court a reply, in words and figures as follows, to wit:

[14]

[Title of Court and Cause.]

REPLY TO ANSWER OF DEFENDANT
GREAT NORTHERN RAILWAY COM-
PANY.

Comes now the plaintiff and for his reply to the answer of defendant, Great Northern Railway Company, admits the affirmative allegations contained in paragraphs numbered II and V thereof.

Replying to the further and separate answer and defense of said defendant, plaintiff denies each and every allegation therein contained, and the whole thereof, except that plaintiff admits that he fell to the ground and sustained certain personal injuries as a result thereof.

WHEREFORE having fully replied to said answer, plaintiff demands judgment against said defendant, Great Northern Railway Company, for the sum of Fifty-three Thousand and Four Hundred and Eighty (\$53,480.00) Dollars, and for his costs and disbursements herein incurred, as prayed for in plaintiff's complaint.

MALARKEY, DIBBLE & HERBRING and
FRANK G. SMITH,
Attorneys for Plaintiff. [15]

State of Oregon,
County of Multnomah,—ss.

I, W. G. Shellenbarger, being first duly sworn, depose and say that I am the plaintiff in the above-entitled cause, and that I believe the foregoing reply to be true.

W. G. SHELLENBARGER.

Subscribed and sworn to before me this 1st day of August, 1930.

[Seal]

A. M. DIBBLE,

Notary Public for the State of Oregon.

My commission expires on July 1, 1932.

Filed August 7, 1930. [16]

AND AFTERWARDS, to wit, on Tuesday, the 30th day of September, 1930, the same being the 68th judicial day of the regular July term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [17]

[Title of Court and Cause.]

MINUTES OF COURT—SEPTEMBER 30, 1930
—ORDER OF VOLUNTARY NONSUIT AS
TO DEFENDANT, SPOKANE, PORTLAND
AND SEATTLE RAILWAY COMPANY.

Upon the oral motion of Malarkey, Dibble & Herbring, of counsel for plaintiff in the above-entitled action, for the entry of a judgment of voluntary nonsuit as to the defendant, Spokane, Portland and Seattle Railway Company, and it appearing to the Court from the record and files in this cause that no counterclaim has been pleaded by said defendant or any other appearance made by it and that said motion should be allowed,—

IT IS HEREBY ORDERED that a judgment of voluntary nonsuit be and the same is hereby entered against the said plaintiff and in favor of said defendant, Spokane, Portland and Seattle Railway Company without costs.

Dated September 30, 1930.

R. S. BEAN,
Judge.

Filed September 30, 1930. [18]

AND AFTERWARDS, to wit, on the 16th day of December, 1930, there was duly filed in said court, a verdict, in words and figures as follows, to wit: [19]

[Title of Court and Cause.]

VERDICT FOR PLAINTIFF.

We, the jury, duly impaneled and sworn to try the above-entitled action, find our verdict in favor of the plaintiff and against the defendant, Great Northern Railway Company, a corporation, and hereby fix and assess the damages to be recovered by plaintiff from said defendant at the sum of \$18,480.00.

Dated December 15, 1930.

J. T. RORICK,
Foreman.

Filed December 16, 1930. [20]

AND AFTERWARDS, to wit, on Tuesday, the 16th day of December, 1930, the same being the 30th judicial day of the regular November term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [21]

[Title of Cause.]

MINUTES OF COURT—DECEMBER 16, 1930— JUDGMENT.

Now at this day comes the plaintiff by Mr. Arthur M. Dibble, of counsel, and the defendant by Mr. Fletcher Rockwood, of counsel. Whereupon the

jurors impaneled herein being present and answering to their names, the further trial of this cause is resumed. And thereafter said jury having heard the evidence adduced, the argument of counsel and the instructions of the court retires in charge of a proper sworn officer to consider of its verdict. And thereafter said jury comes into court and returns its verdict in words and figures as follows, to wit:

“We, the jury, duly impaneled and sworn to try the above-entitled action, find our verdict in favor of the plaintiff and against the defendant, Great Northern Railway Company, a corporation, and hereby fix and assess the damages to be recovered by plaintiff from said defendant at the sum of \$18,480.00.

Dated December 15, 1930.

J. T. RORICK,
Foreman.”

which verdict is received by the Court and ordered to be filed. Whereupon upon motion of plaintiff for judgment,

IT IS ADJUDGED that plaintiff do have and recover of and from said defendant, Great Northern Railway Company, a corporation, the sum of \$18,480.00, together with his costs and disbursements herein taxed at \$69.10, and that execution issue therefor. [22]

AND AFTERWARDS, to wit, on the 20th day of December, 1930, there was duly filed in said court a motion for new trial and in arrest of judgment, in words and figures as follows, to wit: [23]

[Title of Court and Cause.]

MOTION FOR A NEW TRIAL AND IN ARREST OF JUDGMENT.

Defendant, Great Northern Railway Company, respectfully moves the court for a new trial in the above-entitled case and in arrest of judgment for the following causes:

1. The damages awarded by the verdict of the jury to the plaintiff are excessive and appear to have been given under the influence of passion and prejudice.

2. The evidence at the trial was insufficient to justify the verdict.

3. Errors of law occurred at the trial and were excepted to by this defendant as follows:

(a) The court erred in refusing to grant defendant's motion for a directed verdict in its favor.

(b) The court erred in refusing to give defendant's requested instructions II, III, IV and IV—a reading respectively as follows:

“II.

There is no evidence from which you may find that the speed of the train was excessive and negligent. [24]

III.

I charge you that there is no evidence presented in this case that there was a lurch of the train at the moment that the plaintiff fell from the train. The entire matter covered by the allegations relating to the lurching of the train is withdrawn from your consideration.

IV.

I direct you that there is no evidence from which you can find that the defendant was at fault in respect to the condition of the vestibule and the methods used for guarding the open vestibule. Consequently all questions of negligence of the defendant on the condition of the vestibule and the methods used to protect the opening are withdrawn from your consideration.

IV-a.

I instruct you that there is no evidence in this record from which you can find that the trap door of the vestibule, at the place where the accident occurred, was raised; in other words, there is no evidence that the steps were uncovered.”

- (c) The court erred in overruling the objection of the defendant to question propounded to witness, Georgia H. Cheney, relating to the condition of the vestibule and steps of the car when the witness went to the vestibule after having been advised that the accident had happened as follows:

“Q. And what was the situation there with respect to the vestibule and steps.

Mr. ROCKWOOD.—I object to that, your Honor. It has not been shown that the condition at that moment was the same as when the accident happened.

COURT.—I think that is probably for the jury.”

- (d) The court erred in overruling the objection of the defendant to the question propounded to witness, Georgia H. Cheney, relating to an unusual occurrence in the operation of the train prior to the time that the witness went to the vestibule of the car and after the witness had been advised of the accident as follows: [25]

“Q. State whether or not anything unusual occurred with respect to the operation of the train immediately prior to your going back there and observing this condition of this vestibule door; whether anything happened out of the ordinary?

Mr. ROCKWOOD.—I object to that, if your Honor please. I hate to make these objections constantly, but I object to that on the ground that the time is not fixed as being coincident with the accident.

Mr. DIBBLE.—I think the time is pretty well fixed, because the witness has already testified that at the time she observed the door to be open, that the train was slowing down to make this stop at Saco, to take this siding, which is shown to be about half a mile.

COURT.—I think that is for the jury.”

- (e) The court erred in overruling the objection of the defendant to question propounded to witness, Mrs. J. L. Freck, relating to the condition of the vestibule when the witness went to the vestibule of the car after having been informed of the accident as follows:

“Q. Now when you went back there, which you say was immediately after this announcement that a Sir Knight had fallen from the train, the train was still in motion, and hadn’t yet come to Saco, what condition did you find the vestibule of that coach in?

Mr. ROCKWOOD.—I object to that, your Honor, because there is nothing to show that the condition at that time was the same as the condition at the time of the accident.

COURT.—I think she can testify.”

- (f) The court erred in overruling the objection of the defendant to the question propounded to witness, J. O. Freck, relating to the condition of the vestibule when the witness went to the vestibule after having been informed of the accident as follows:

“Q. What was the condition of the vestibule there at the rear end of that coach?

Mr. ROCKWOOD.—I repeat the objection this is not competent; not shown the condition was the same at the time of the accident. [26]

COURT.—Have to get to that by a process of elimination I suppose; go ahead, you can answer.”

The foregoing motion is made upon the pleadings and proceedings in the trial of the above-entitled case, including the minutes of the court, for the causes above specified each of which is a cause specified in Section 2-802 Oregon Code Annotated, 1930, being the same as Section 174 Oregon Laws, and in accordance with the rules of this court.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,

Attorneys for Defendant, Great Northern Railway Company.

Filed December 20, 1930. [27]

AND AFTERWARDS, to wit, on Tuesday, the 24th day of February, 1931, the same being the 77th judicial day of the regular November term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [28]

[Title of Cause.]

MINUTES OF COURT—FEBRUARY 24, 1931—
ORDER DENYING MOTION FOR NEW TRIAL.

This cause was heard by the court upon the motion of the defendant Great Northern Railway Company, a corporation, for a new trial herein, and was argued by Mr. Arthur M. Dibble, of counsel for the

plaintiff, and by Mr. Fletcher Rockwood, of counsel for the said defendant. Upon consideration whereof,—

IT IS ORDERED that the said motion be and the same is hereby denied. [29]

AND AFTERWARDS, to wit, on Friday, the 13th day of March, 1931, the same being the 11th judicial day of the regular March term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [30]

[Title of Court and Cause.]

MINUTES OF COURT—MARCH 13, 1931—
ORDER RE ATTACHING ORIGINAL EXHIBITS TO PROPOSED BILL OF EXCEPTIONS.

Upon application of the defendant, Great Northern Railway Company,—

IT IS HEREBY ORDERED that the original exhibits offered and received in evidence at the trial of the above-entitled case on behalf of the plaintiff and the defendant, being Plaintiff's Exhibits numbers 1 to 4, inclusive, and Defendant's Exhibits "A" to "J," inclusive, be withdrawn, and thereupon attached to, to form a part of proposed bill of exceptions filed and presented by the defendant on this date.

Dated March 13th, 1931.

JOHN H. McNARY,
Judge.

Filed March 13, 1931. [31]

AND AFTERWARDS, to wit, on the 3d day of April, 1931, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [32]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

This cause came on for hearing before the Honorable Robert S. Bean and a jury, on the 11th day of December, 1930; Messrs. A. M. Dibble and Frank G. Smith appearing as attorneys for the plaintiff, and Mr. Fletcher Rockwood appearing as attorney for the defendant.

There is annexed hereto and made a part hereof a complete stenographic report of the evidence, all objections, motions, and rulings thereon, and the whole thereof, together with the instructions of the Court to the jury and the exceptions, certified to by Mary E. Bell, Reporter of the United States District Court for the District of Oregon.

There are also annexed hereto and made a part hereof all of the exhibits offered and received in evidence upon the trial, being Plaintiff's Exhibits 1 to 4, inclusive, and Defendant's Exhibits "A" to "J," inclusive.

After hearing all of the evidence, the argument

of counsel and the charge of the Court, the jury retired to consider their verdict and thereafter returned a verdict in favor of the plaintiff, assessing his damages at \$18,480, upon which [33] verdict judgment was thereafter and on the 16th day of December, 1929, entered by the Court against the defendant.

Thereafter and on the 20th day of December, 1930, the defendant served and filed its motion for a new trial and in arrest of judgment, upon the grounds that the verdict was excessive and the result of passion and prejudice, and that certain errors of law, as particularly specified in said motion, occurred at the trial.

The Honorable Robert S. Bean, the Judge who presided at the trial, died before he had ruled on and disposed of said motion, and thereafter and on the 16th day of February, 1931, said motion was argued orally before the Honorable John H. McNary, another of the Judges of this court. Thereafter and on the 24th day of February, 1931, the Honorable John H. McNary made the order of this court denying said motion for a new trial and in arrest of judgment.

During the trial of said cause, on direct examination of Mrs. Georgia H. Cheney, a witness called on behalf of the plaintiff, a question was propounded to said witness in words, as follows:

“Q. And what was the situation there with respect to the vestibule and steps?”

Counsel for the defendant objected thereto, and the Court overruled the objection. To the overrul-

ing of the objection the defendant excepted and its exception was thereupon allowed.

During the trial of said cause, on direct examination of Mrs. J. L. Freck, a witness called on behalf of the plaintiff, a question was propounded to said witness in words, as follows: [34]

“Q. Now, when you went back there, which you say was immediately after this announcement that a Sir Knight had fallen from the train, the train was still in motion and was not yet at Saco, what condition did you find the vestibule of that coach to be in?”

Counsel for the defendant objected thereto, and the court overruled the objection. To the overruling of the objection the defendant excepted and its exception was thereupon allowed.

During the trial of said cause, on direct examination of J. O. Freck, a witness called on behalf of the plaintiff, a question was propounded to said witness in words, as follows:

“Q. What was the condition of the vestibule there at the rear end of the coach?”

Counsel for the defendant objected thereto, and the Court overruled the objection.

At the close of all of the testimony offered and received upon the trial, and before the argument of counsel and the submission of the case to the jury, defendant moved the Court for an order directing the jury to return a verdict in its favor, which said motion was as follows:

“The defendant at this time moves the Court for a directed verdict in its favor on the ground

that there is no evidence of any excessive speed, and no evidence of any excessive or unusual lurch of the train; on the further ground that the evidence fails to prove it was negligent in any particular alleged with respect to the condition of the vestibule, as to lights, opening, or method of safeguarding the vestibule; that there is no evidence from which it can be determined that any alleged act of the defendant was the proximate cause of plaintiff's injury—of the accident and his resulting injury. And further that the evidence shows that plaintiff was guilty of contributory negligence and that such negligence was the proximate cause of the accident.”

Thereupon the Court overruled said motion. To the order overruling its motion the defendant excepted and its exception was [35] thereupon duly allowed.

At the close of all of the evidence offered and received upon the trial, and before the argument of counsel to the jury, the defendant presented to the Court, in writing, certain requested instructions to be given to the jury, including, among others the following:

“II.

There is no evidence from which you may find that the speed of the train was excessive and negligent.

“III.

I charge you that there is no evidence presented in this case that there was a lurch of

the train at the moment that the plaintiff fell from the train. The entire matter covered by the allegations relating to the lurching of the train is withdrawn from your consideration.

“IV.

I direct you that there is no evidence from which you can find that the defendant was at fault in respect to the condition of the vestibule and the methods used for guarding the open vestibule. Consequently all questions of negligence of the defendant on the condition of the vestibule and the methods used to protect the opening are withdrawn from your consideration.

“IV-a.

I instruct you that there is no evidence in this record from which you can find that the trap door of the vestibule, at the place where the accident occurred, was raised; in other words, there is no evidence that the steps were uncovered.”

The Court refused to give said requested instructions numbered II, III, IV and IVa, or any one of them, to which refusal the defendant excepted and its exception was thereupon allowed.

Defendant tenders herein its bill of exceptions to the action of the Court at the trial, and the action in denying the defendant's motion for a new trial

and in [36] arrest of judgment, in each of the particulars set forth herein.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,

Attorneys for Defendant.

Service of the foregoing bill of exceptions is hereby admitted this 13th day of March, 1931.

A. M. DIBBLE,
Attorney for Plaintiff. [37]

[Title of Court and Cause.]

PLAINTIFF'S OBJECTIONS AND AMENDMENTS TO DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

Comes now the plaintiff and objects to the bill of exceptions proposed and served herein by the defendant on March 13, 1931, and respectfully moves the Court that said bill of exceptions be amended in the following particulars, to wit:

I.

That there be added after the word "before" in line 13, page 2, the following words "and briefs submitted to" and after the word "Court" in line 14, page 3, the following words "and by the latter taken under advisement."

II.

That there be added after the word "allowed," line 26, page 2, the following:

“Thereupon, and without said question being answered, said question was repeated in the following form:

Q. Just what was the condition of the vestibule door, and the steps, when you saw it, on the rear of your car? And the said witness testified as follows:

A. The door was open.

Q. On which side of the train would that be, as you walked towards the engine?

A. Left-hand side.

Q. Left-hand side, and did you observe whether or not both the door [38] and the steps were open, or was it just the door only?

A. I can't say as to that.”

III.

That there be stricken from said bill of exceptions all that portion thereof beginning with the word “during,” line 9, page 3, and ending with the word “objection,” line 14, page 3, for the reason that no exception was either taken or allowed to the question included therein.

IV.

That there be stricken the words “to which refusal the defendant excepted and its exception was thereupon allowed,” lines 24 and 25, page 4, and that there be inserted in lieu thereof the following:

“After the jury left the jury-box and had retired the following colloquy ensued between counsel for defendant and the trial court and the following proceedings occurred, to wit:

Mr. ROCKWOOD.—May we have an exception, if your Honor please, to the refusal of the Court to give requested instructions 1, 2, 3, 4 and 4-a?

COURT.—That is the motion for a directed verdict?

Mr. ROCKWOOD.—Specific request to take away certain issues from the jury.

COURT.—You can have your exception, but I might advise you that it will be unavailing because the Circuit Court of Appeals has repeatedly held that exception must be taken before the jury retires.

Mr. ROCKWOOD.—That is what I had reference to when I spoke to you before; I did not care to interrupt the Court.

COURT.—You have the same thing in your motion for a directed verdict, so that matter is probably taken care of.”

Dated March 17, 1931.

MARLARKEY, DIBBLE & HERBRING,
Attorneys for Plaintiff. [39]

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Portland, Oregon, December 11, 1930.

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[40-41]

[Title of Court and Cause.]

BE IT REMEMBERED that this case came on to be heard before the Honorable ROBERT S. BEAN, Judge of the above-entitled court, on Thursday, the 11th day of December, 1930, at the hour of ten o'clock A. M., the plaintiff being present in person and represented by his attorney Mr. A. M. Dibble, and the defendant being represented by its attorney, Mr. Fletcher Rockwood,

WHEREUPON the following proceedings were had: [42—1]

Mr. DIBBLE.—If the Court please, prior to making my opening statement, I would apply to the court at this time for leave to amend the plaintiff's complaint in certain respects. The amendments that we ask are confined entirely to Paragraph VII of the complaint, which is the portion which deals with the alleged negligence on the part of the company. I have written out the amendment desired. In subdivision 1 of Paragraph VII it is alleged as one of the grounds of negligence that this train was being operated at a reckless speed at a time when the train was about to enter a cross-over, and that that caused the train to give an unusual and violent lurch. I have found, in interviewing witnesses whom we will call, that the collision occurred before they had gotten to the siding proper. They were approaching, and as we say, about to enter. I wish to amend by stating that as they were about to take the siding and slowing down the train for the purpose of later entering the siding, they so carelessly and negligently operated the train as to cause it to give an unusual and unnecessary lurch, thereby causing the plaintiff to lose his balance and fall.

COURT.—You mean approaching the siding and not taking the siding?

Mr. DIBBLE.—Yes, and the lurch must have been caused by the improper operation of the train for the purpose of slowing down to take the crossing. In the second subdivision, we have alleged

that the company was careless in that, this being a vestibule train, they had carelessly left the vestibule door open between the cars, the steps and the vestibule, thereby causing— [43—2]

COURT.—You want to change that?

Mr. DIBBLE.—Want to change it in this respect: I want to add that they were negligent in having the train open at the place where they did. It will be our contention that they should not have had the train open beyond the rear end of it, and this accident occurred further up in the train, at a point where passengers would pass to and fro.

COURT.—You may serve those proposed amendments of that allegation.

Mr. DIBBLE.—And also we allege that they didn't give warning to this man that the vestibule was open, and it wasn't sufficiently lighted to apprise him of the situation. It does add this new element but I have felt, in view of the fact that they have their train crew here and have in their possession all the facts—

COURT.—See whether Mr. Rockwood has any objections.

Mr. ROCKWOOD.—If your Honor please, Mr. Dibble made a proposition to stipulate on the afternoon of Tuesday. I declined to stipulate and I wish to make formal objection at this time to the amendment, particularly going to the first amendment, the place where the accident happened. That is, whether the accident happened when the train was going on the siding, or whether the accident happened on the main line is very material under

the first allegation. I have the train crew here and have had an opportunity, of course, to discuss this with them, and they are available as witnesses on whatever theory the case is tried. I have tried to obtain some outside witnesses, that is men who are not employees or passengers on the train, but not finding [44—3] a witness from the outside, we have been satisfied to develop the fact that the train was on the main line, and being satisfied on that point, did not go to the extent of finding witnesses on the question of lurch. I have not investigated the question of lurch extensively with outside witnesses, and I wish to make formal objection to it.

COURT.—It seems to be within the discretion of the Court, and you may make your amendments.

Mr. ROCKWOOD.—I would like to note an exception. [45—4]

TESTIMONY OF WALTER L. CORNELL, FOR PLAINTIFF.

WALTER L. CORNELL, a witness called in behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Cornell, where do you reside, please?

A. No. 1333 Thompson Street, this city.

Q. About how long have you lived in Portland?

A. Nineteen years—eighteen years; I will correct that.

(Testimony of Walter L. Cornell.)

Q. What is your business at present?

A. Engaged in the commercial printing business, handling contracts and notes.

Q. Where is your office?

A. In the American Bank Building.

Q. Do you know Mr. Shellenbarger, plaintiff?

A. I do.

Q. And for how long have you known him, Mr. Cornell? A. About fifteen years.

Q. And state whether or not you were on the Great Northern train which has been called here the Knight Templars Special at the time Mr. Shellenbarger was injured.

A. I was.

Q. State whether or not you are a member of the Knights Templar yourself? A. I am.

Q. You were formerly, I believe, Commander of the Oregon Commandery? A. Yes, sir.

Q. And you were on the train then for the purpose of attending [46—5] this conclave to be held in Detroit, Michigan? A. Yes, sir.

Q. I wish you would state to the jury, Mr. Cornell, just where on the train you were riding at the time Mr. Shellenbarger was injured.

A. I was in the rear platform of the observation-car.

Q. And do you know about how many cars there were in the train? A. No, sir, I could not say.

Q. But there were a number of cars ahead of the observation-car? A. Yes, indeed.

Q. This observation car was the rear car of the train, was it? A. It was.

(Testimony of Walter L. Cornell.)

Q. And state whether or not it was a train having an iron railing around the back. A. It did, yes.

Q. Similar to what we see in going on trains? A. Yes, sir.

Q. And state whether or not it had gates there so it could be opened up and get off the rear by steps. A. Yes, there were gates there.

Q. There were gates there at the rear of the vestibule, so that if it was desired by the brakeman or anybody else, they could open up the rear door and pass by steps off the rear platform. That is true, is it? A. Yes, sir.

Q. And you were riding on the rear platform of the observation-car? A. Yes, sir.

Q. I wish you would state, Mr. Cornell, to the jury, whether or not anything extraordinary or unusual occurred with respect [47—6] to the train just previous to Mr. Shellenbarger falling from it?

Mr. ROCKWOOD.—Your Honor, I object to that, because it has not been shown that this man knew when Mr. Shellenbarger fell off. We are getting down to split seconds in this case, and I think it important to limit the witness to what he knows.

COURT.—I think that is important.

Mr. DIBBLE.—We are premature in this respect.

Q. When did you first learn that Mr. Shellenbarger had been—had fallen from the train?

A. When the brakeman came on to the back plat-

(Testimony of Walter L. Cornell.)

form and explained that he had lost a Sir Knight off the train.

Q. How soon did he come back through the observation car and state that, with respect to this matter that I am inquiring about; how soon was that after this other question that I put to you?

Mr. DIBBLE.—I intend, your Honor, to follow up and show this matter. It makes it rather awkward to prove it from this back end view, but in view of counsel's objection, and what Court desires to make clear, it is perfectly proper, and the order that is proper.

Q. I am inquiring about the unusual operation of the train, what you may have observed in that regard; how close was that connected to the accident to Mr. Shellenbarger?

Mr. ROCKWOOD.—I object to that question on the same grounds.

Mr. DIBBLE.—I am going to follow it up. I will ask the other question again.

Q. I will ask you to state whether or not—

COURT.—You might ask how soon this alleged unusual [48—7] operation occurred before the brakeman came in. Maybe you can place it that way.

Mr. DIBBLE.—Yes, that is a good way to get at it.

Q. What interval of time was there from this unusual occurrence until the brakeman came through and said a Sir Knight had fallen from the train? A. Immediately after that.

(Testimony of Walter L. Cornell.)

COURT.—Immediately what?

A. Immediately after.

COURT.—What do you mean by “immediately.”

A minute, half a minute, two minutes, or what?

Q. Or seconds? You mean minutes or seconds?

A. I have no way of telling how much time elapsed. I can simply tell you what happened, and that is all I will attempt to do.

Q. Well, the Court would like to know, and the jury, I think, *whether was* a minute, right there at that time. A. Very short duration. I am not—

Q. State if you will, then, Mr. Cornell, to the jury, what if anything you observed with respect to the operation of this train, immediately prior to the brakeman coming through and saying that a Sir Knight had fallen from the train?

A. I was sitting on the rear platform with a Mr. Stuart, Mr. Bruce Stuart, and Mrs. Cornell and there was a lurch of the train that caused me to go forward in my chair, and Mr. Stuart says, “Something has happened.” And he raised from the chair and looked out around the end of the car, and made the remark, “We are coming into a station,” and immediately after that the brakeman came out on the back platform and made the statement that we had lost a Sir Knight off the train.

[49—8]

Q. Now, if I understand you, then, Mr. Cornell, there were you and Mrs. Cornell, that is, your wife, and Mr. Stuart on the back of the observation car?

(Testimony of Walter L. Cornell.)

A. There may have been some other people on there, but we were over on the—well, it would be on the right as the train was proceeding east. We were on the right side, sitting there in chairs.

Q. As I understand, you were all seated?

A. All seated; yes.

Q. And state a little more particularly, if you will, the nature of this lurch that you say occurred just before the brakeman came through there. How violent was it? You described it to a certain extent. Was it just an ordinary lurch, or an ordinary swaying of the train, or was it something unusual or extraordinary?

A. We had been running at a good speed on a comparatively straight-away. Mr. Stuart was explaining the condition of the signals to my wife, and the train was running smoothly—so smoothly that when this—whatever happened, application of the brake, or soft mud, or whatever it was, it kind of caused us to go forward a little, and at that time he made this remark; something out of the ordinary; and looking ahead he then said, “Well, we are coming into a station.”

Q. And he went around—he had to go around—look around the back of the car towards the front, Mr. Stuart did, to see what had happened. Was that it?

A. He was sitting near the rail. My wife was in the back, and I was pulled out somewhat in front; and he simply raised up and looked around the end of the car.

(Testimony of Walter L. Cornell.)

Q. And this lurch that you speak of was sufficient to throw [50—9] you forward in the seat, although you were sitting down?

A. Well, it was just out—extraordinary, as we had been running along, and this condition was such that it caused us to know that something was happening.

Q. And then after the brakeman came through and said a Sir Knight had fallen from the train, what was done in regard to getting the train stopped, that you know of?

A. All that I recall was that I was—as I was jumping off from the back platform, someone was pulling the cord. I couldn't tell you who that was. It was made—I couldn't say who it was. I have always been under the impression it was Mr. Sawyer, but I am not sure.

Mr. ROCKWOOD.—I move that that be stricken.

Mr. DIBBLE.—Yes, there won't be any objection to that.

Q. Then tell the jury what you did and what the brakeman did with respect to finding Mr. Shellenbarger, where he was, etc.

A. As this remark was made by the brakeman, Mr. Stuart vaulted off the back—off the rear of the platform.

Q. Was the train still in motion when he vaulted over? A. The train was still in motion.

Q. About how fast was it going then?

A. I couldn't tell you. It was moving; it was moving when I went off the train. The brakeman

(Testimony of Walter L. Cornell.)

was unlocking the gate, and as he pulled open the gate I jumped to the ground, and Mr. Stuart was running ahead with the lantern.

Q. Mr. Stuart got off first, did he?

A. Stuart was the first man off the train.

Q. Then who got off next? Did you get off ahead of the brakeman?

A. I was ahead of the brakeman, but I don't know whether [51—10] anyone was ahead of me or not. It was rather an exciting moment, and we were running back to find the man who had fallen off the train.

Q. Where was the train finally brought to a stop? How far from the place where Mr. Shellenbarger was thrown off?

Mr. ROCKWOOD.—I object to that. I don't think this witness knows. He left the train, he wasn't on the train when it stopped.

Mr. DIBBLE.—I believe he does know. I think we can clear that up—develop that.

Q. State whether or not you walked back and found Mr. Shellenbarger. A. I did.

Q. How did you get back from where he was, to the train?

A. After the boys had carried Mr. Shellenbarger from the position in which we found him, they secured an automobile and there was a road to the left, and they took Mr. Shellenbarger, carried him across the space intervening, and put him into this car, and I walked back with the brakeman.

Q. That is what I am getting at. You walked

(Testimony of Walter L. Cornell.)

back from where Mr. Shellenbarger was lying on the right of way; you walked from there back to where the train finally stopped? A. Yes, sir.

Q. With the brakeman, to Saco. Isn't that true?

A. Yes, the brakeman and I walked back.

Q. You know how far you walked, don't you? How far was it from where Mr. Shellenbarger was found on the right of way, back to where you got on the train again?

A. I would say about half a mile.

Q. About half a mile. And you walked that distance along [52—11] with the brakeman?

A. Yes, sir.

Q. Do I understand you to say there was a county road, a public road, that paralleled the track back there, and Mr. Shellenbarger was put in an automobile on that county road, and transported that way back to Saco? A. Yes, sir.

Q. Is that true?

A. He was taken back to the train.

Q. From the time you got off the train, Mr. Cornell, and while you were walking back to find Mr. Shellenbarger, was the train—state whether or not the train was still in operation? Did it stop right there as an emergency stop, or did it go on and make a siding?

A. I was not walking back; I was running back. I know nothing about what the train was doing while I was running back.

Q. What I am getting at is, did the train stop

(Testimony of Walter L. Cornell.)

after Mr. Shellenbarger was thrown off, until it got clear on this siding, as far as you know?

Mr. ROCKWOOD.—I object to that. As I said, he doesn't know anything about the train operation.

COURT.—He wasn't watching the train. May tell if he can where the train was when he boarded it.

Q. Yes, where was the train when you came back with the brakeman and boarded it, after Mr. Shellenbarger was thrown off?

A. When we found Mr. Shellenbarger—

COURT.—Where was the train when you came back, Mr. Cornell? When you went back to the train after you found him, on the main line, or on the siding?

A. The train was on the siding, in the station.
[53—12]

Q. But you don't know—and if you don't, you would not have a right to say, you don't know whether or not it stopped after Mr. Shellenbarger was thrown off, before it came to this point where you saw it afterwards? A. I do know, yes.

Q. What did happen with the train?

Mr. ROCKWOOD.—Just a moment. May I ask a question?

Mr. DIBBLE.—Surely.

Mr. ROCKWOOD.—You said, Mr. Cornell, that you knew nothing about the operation of the train while you were running back?

A. While I was running back, sure.

Mr. ROCKWOOD.—Now you say you do know

(Testimony of Walter L. Cornell.)

about the operation of the train. Before you answer the question, I wish you would explain the inconsistency of those two answers.

A. There is nothing inconsistent about it. When I was running back I did not know what happened to the train, but after we found Mr. Shellenbarger, signals were given by Mr. Stuart, or were attempted. We were trying to get the train to back up, and instead of the train backing up, we could see that it was going ahead, and it did go ahead.

Q. Beyond the siding?

A. I don't know what it made. When I got back the train—after I had left the train, it had stopped. When we found Mr. Shellenbarger then the train was standing still, stopped, and while we were there Mr. Stuart was giving signals with the lantern, attempting to get that train back to pick this man up, but instead of doing that the train moved ahead. I remarked to the brakeman that the train was moving ahead, and he said it had to go into the crossing. [54—13]

Q. And state whether or not this train that was coming towards it, that seemed to have the right of way, did that come past this train while you were on the right of way there walking back?

A. Yes, the train went through while I was walking back with the brakeman; the fast train went by us.

Q. Where did you find Mr. Shellenbarger? Where was he lying?

A. He was between the two tracks. It was a

(Testimony of Walter L. Cornell.)

double track there, one under construction, or was being repaired, and the main line. We found him between these two tracks.

COURT.—On the right side, or left side of the train?

A. He would be on the left side of our track, as we were going east.

Q. Was he lying on his back, or on his side, or how?

A. Mr. Stuart was holding him, and as I reached there he asked me to support Mr. Shellenbarger.

Q. Mr. Stuart asked you?

A. He was sitting down.

Q. He was sitting down? A. Yes.

Q. What was Mr. Shellenbarger's condition, was he conscious?

A. Oh, no, absolutely not. He was bleeding badly from the head, and I held him there during the time that we—they were trying to get—while they were waiting for the machine to come pick him up.

Q. Did you notice his watch?

A. Later. At the time Mr. Stuart—at the time they carried—after they carried Mr. Shellenbarger across to the car, Mr. Stuart asked me if I would see if there were any belongings of the man; and I found his watch, and his glasses. [55—14]

Q. Where was his watch?

A. His watch was lying in the ground.

Q. Was it loose from his vest?

A. Loose from his vest entirely.

(Testimony of Walter L. Cornell.)

Q. Where were his glasses lying?

A. Glasses on the ground. I found those later, and also a pencil, I believe, and a memorandum-book.

Q. Were the glasses broken?

A. They were not.

Q. And you held his head up, did you?

A. I did.

Q. How extensive was the bleeding you noticed there? Where was the blood coming from?

A. From his head some place, but I couldn't tell you where.

Q. Did you have your arm under the back of his head, supporting him up?

A. Yes, I had my arm around back, left arm around back, and my entire sleeve and shirt was a mess of blood when I got back to the train. I had wiped some of it off my hands on my handkerchief, but the rest of it—

Q. Did you change your shirt when you got back to the train?

A. I don't think I changed my shirt; I think I went to bed.

Q. About time to go to bed? A. Yes, sir.

Q. After the boys came down the highway paralleling that track, with an automobile, they took Mr. Shellenbarger, as I understand it, and lifted him over a wire fence into this car. Was that it?

A. I am unable to say. I didn't assist in carrying him at all. They simply carried him from the

(Testimony of Walter L. Cornell.)

spot where we found him, and [56—15] the brakeman and myself were the only ones left.

Q. You and the brakeman walked back along the right of way then, did you?

A. Along the right of way to the station.

Q. Along the right of way to the station at Saco, to where the train was standing on the siding?

A. That is correct.

Q. And while walking back with the brakeman, this fast train came right through? A. Yes, sir.

Q. Was it very long from the time when you got back to where Mr. Shellenbarger was, that this fast train came through?

A. Well, it must have been several minutes. Must have been in the neighborhood of ten minutes, I would imagine, because we had carried Mr. Shellenbarger there. He was not there at all at the time the train came through. Only the brakeman and myself walking up the right of way. The other boys had all gone, they had taken Mr. Shellenbarger and gone with him in the machine.

Q. Do you know whether or not this train that had the right of way, stopped up there at Saco, or whether it came right on through as was planned?

A. I cannot say.

Q. You do not know of your own knowledge?

A. I do not, no.

Q. Now, in walking back with the brakeman, did you have any conversation with him as to how the accident occurred?

A. Yes, I had a conversation with the brakeman.

(Testimony of Walter L. Cornell.)

Mr. DIBBLE.—Which one is the brakeman, Mr. Rockwood, [57—16] is he in the courtroom?

Mr. ROCKWOOD.—Yes. (To the brakeman.) Will you stand up?

A. Looks like the man.

Q. That is the gentleman. Do you recognize this gentleman here? A. Well, I am—

Mr. ROCKWOOD.—That is all right Mr. Brown; sit down.

A. Well, I am unable to recognize him. I couldn't swear absolutely he was the brakeman. I only know I had a conversation with the brakeman on the train.

Q. Did you have a conversation with the same man that came through the observation car and said a Sir Knight had fallen off the train?

A. The same man, yes.

Q. The same man. And what did he say, if anything, as to how the accident occurred?

Mr. ROCKWOOD.—I object to that, if your Honor please, as incompetent, irrelevant, immaterial, and hearsay; not a part of the *res gesta*.

COURT.—I think the objection is well taken. The brakeman could not by any declaration he made after the event, bind his principal.

Mr. DIBBLE.—That is probably true; I will not insist on it.

Q. I will ask you this question: State whether or not you noticed the condition of this vestibule at the rear of the coach ahead of the observation car, before the accident, or afterwards?

(Testimony of Walter L. Cornell.)

Mr. ROCKWOOD.—I object to that as incompetent and irrelevant, because the condition afterwards certainly does not tend to prove the condition at the time of the accident. [58—17]

COURT.—I think when he went back to the train, if he examined it, he might tell what he saw. It may not be very material.

Mr. DIBBLE.—Of course it might have been closed by that time, I appreciate that.

Mr. ROCKWOOD.—Lots of things could have happened.

Q. I will just ask you now, Mr. Cornell, did you take any notice or observation of the condition of the vestibule at the rear of the coach ahead of the observation car, at any time before or after the accident? A. I did not.

Q. And in walking back with the brakeman after the accident, did the brakeman make any statement to you with regard to whether the vestibule and steps were open at the time the accident occurred—that is a little different, your Honor.

Mr. ROCKWOOD.—Now, I have no objection to his answering as to whether the brakeman did, or did not, make a statement, but I want it limited to that. Just, did the brakeman make a statement? Don't say what he said.

COURT.—Just answer yes or no.

Q. You have no right to say what the brakeman told you; but did the brakeman make any statement to you as you walked back there, as to whether the

(Testimony of Walter L. Cornell.)

door and steps were open or not at the time Mr. Shellenbarger fell?

Mr. ROCKWOOD.—Just whether he made a statement. Don't say what he said.

COURT.—Whether any statement. Not what he said, but did he make a statement to you?

A. Yes, he made several statements to me. [59—18]

Q. And state whether or not you asked the brakeman how the accident occurred—just yes or no.

Mr. ROCKWOOD.—Just answer that yes or no.

A. Yes.

Q. And state whether or not, yes or no, he answered your question and stated to you how he claimed that the accident occurred? A. Yes.

Q. Now, was this train what we call a vestibule train; between the coaches had vestibules, or had you been back and forth in the train during the trip there?

A. Yes, I had been back and forth on the train.

Q. Where was your coach with respect to the observation car?

COURT.—I infer from Mr. Rockwood's statement, there is no controversy.

Mr. ROCKWOOD.—No, no controversy.

Mr. DIBBLE.—Throughout the train?

Mr. ROCKWOOD.—Yes.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Now, when you were sitting on the observation

(Testimony of Walter L. Cornell.)

car platform, you were looking back, were you, at the signals on the track in the rear of the train?

A. Yes, sir.

Q. You were facing the rear of the train?

A. Yes, sir.

Q. And I assume that the chairs you were sitting in had backs? You were leaning back in the chair, you were not sitting on stools, were you?

A. That I could not say. There were both kinds there, I am [60—19] not sure of that.

Q. You don't know whether you were sitting on a chair, or on a stool? A. No, I do not.

Q. Do you know whether Mr. Stuart was sitting on a chair, or on a stool? A. I do not.

Q. Now, when this occurrence happened which caused you to move forward a little in the chair, do you remember whether you leaned out into space, or did it just put you back against the back of the chair a little bit? Do you remember?

A. I am not sure whether—I just know there was a slight commotion there, which caused Mr. Stuart to make this remark and tell us he thought we were coming into a station.

Q. What was it? You say a slight motion which caused him to make a remark. You had felt that same kind of slight motion on other occasions when the train was stopped, hadn't you?

Mr. DIBBLE.—I think he said "commotion."

A. Commotion.

Q. Had you been on the platform at other station stops?

(Testimony of Walter L. Cornell.)

A. Yes, I had been about the train all the time.

Q. Had you been sitting on the observation platform at other times the train had stopped, do you remember? A. I am not sure of that.

Q. Well, was this—can you remember, was this a slight motion, or a slight commotion, was it just about the same kind of motion in the train that you would get at other station stops when the train was slowing down in operation?

A. I am not sure whether that the feeling would be like [61—20] it would in another station or not, there is all kinds of motions on trains.

Q. Sure. In walking up and down through the train while the train was running along regularly, you were conscious all the time of the motion of the train, and that you had to kind of balance yourself from the motion of the train?

A. I always had to.

Q. And when the train goes around a curve you are conscious of the fact that you have to balance yourself and steady yourself on the curves, don't you. Isn't that true?

A. If *you walking* down the train?

Q. Yes. A. Down the car?

Q. Sure.

A. Yes, surely you have to balance yourself.

Q. And this accident happened while the train was running on a perfectly straight track, wasn't it?

A. That is my understanding, yes, sir. I am sure of that, straight track.

Q. It is your estimate that the point where you

(Testimony of Walter L. Cornell.)

picked up Mr. Shellenbarger, or found Mr. Shellenbarger, was about half a mile from the point where the train stopped, and where you came back to the train after the accident?

A. That would be my best judgment.

Q. Of course you didn't pace it, and you had no way of measuring it? A. None whatever.

Q. That is just your recollection?

A. That is just my judgment in the matter. [62—21]

Q. Do you remember whether—first, did you walk back along the track, or along the road?

A. Back to the station?

Q. Back to the train, afterwards?

A. Along the track.

Q. Now, in walking along the track, did you walk over a bridge, do you remember?

A. There was a culvert I believe, of some kind; I wouldn't say it was an extensive bridge, but there was a culvert, and—well I know that; I know we went over a culvert coming back.

Q. Pretty large culvert; was big enough so you could see it in the night?

A. Yes, I noticed it as I was coming back.

Q. When you ran back to Mr. Shellenbarger do you remember running over that culvert?

A. I do not.

Q. So that culvert then was, apparently, on the basis of your testimony, between the point where Mr. Shellenbarger fell off, and the station?

A. Yes, sir.

(Testimony of Walter L. Cornell.)

Q. Now, is your recollection very definite as to the place where Mr. Stuart was located on the observation platform, prior to the time you were told by the brakeman—

A. That he was there?

Q. As to his precise location on the platform?

A. Well, I think so, yes, sir.

Q. As a matter of fact, Mr. Cornell, wasn't Mr. Stuart standing up with his back against the railing, on the back end of the platform, which would make him facing toward the front of the train?

[63—22] A. I don't believe.

Q. You don't? A. No, I don't believe.

Q. That isn't your recollection?

A. It is not my recollection at all.

Q. You say when you jumped off someone was pulling the cord? Where was that man standing that was pulling the cord?

A. Standing on the rear platform.

Q. Somebody by that time was on the rear platform pulling the cord?

A. Yes, the rear platform of the observation car.

Q. When you felt this slight commotion that you referred to, have you any way of estimating what the speed of the train was at that time?

A. No, I have no way.

Q. There was nothing so unusual about the speed at that time that your attention was called, or concentrated on the speed in any way, was there?

A. We were slow—we had been running rather fast, and we were slowing down. We were running slower than we had been, at the time this jar or

(Testimony of Walter L. Cornell.)

lurch came there, and it was sufficient to cause Mr. Stuart to get up and look to see what was the matter.

Q. Now, do you recall whether you had slowed down before you felt this slight commotion? Had the train slowed down from its running speed before you felt that slight commotion?

A. I would say yes.

Q. It had slowed down, then you felt the slight commotion. Did you examine the ground near the spot where Mr. Shellenbarger [64—23] *Mr. Shellenbarger* was found, to see whether there were any marks on the ground of sliding, or foot marks, or anything such as that?

A. I did examine it, yes, sir.

Q. Could you find any indications on the ground that Mr. Shellenbarger had slid or moved as he hit the ground.

A. The imprint of his body was there; shoulder and his head were very clear in the ground. There was soft dirt where he fell, or rather where we found him.

Q. Was that imprint of his body there right at the spot you found him later?

A. It was right at that spot.

Q. So that the fact is that from the time his head struck the ground he didn't move or slide forward in the direction in which the train was moving. Is that correct—from the instant his head hit the ground?

A. Well, I can't tell you that. There was—the people had been gathered around there, and there

(Testimony of Walter L. Cornell.)

were a great many footprints, etc. We just had—I noticed that particularly where the imprint of his body was there.

Q. You say the ground was soft. As a matter of fact there was some new construction work just to the north of the main line track, right at that location, wasn't there; between the main line track and the county highway, there was some new construction, a new fill; is that right?

A. There was another track there that was being worked upon, and there were some rails that were between these tracks, to the east of where we found him.

Q. Now did you walk along that other track at all to examine it? Can you give us any detail as to that other track? [65—24]

A. It was in a rough condition.

Q. In a rough condition?

A. In a rough condition. My reason for knowing that is that when this train started to come through, the fireman was walking down in the right of way between that, but I took no chances. I climbed up on this other track, and in fact it was in—it was under repair or something of that kind; it was rough.

Witness excused. [66—25]

TESTIMONY OF MRS. GEORGIA H. CHENEY,
FOR PLAINTIFF.

Mrs. GEORGIA H. CHENEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mrs. Cheney, you are the wife of Rufus Cheney, are you? A. I am.

Q. He is the Grand Secretary, I guess, of the Masonic Order in Oregon, is he? A. He is.

Q. Has been for many years. A. Yes, sir.

Q. Will you state, Mrs. Cheney, whether or not you were on this Knight Templars special?

A. I was.

Q. At the time Mr. Shellenbarger was injured?

A. I was.

Q. And in what coach were you riding with respect to the observation car?

A. The coach next to the observation-car.

Q. Would you say the car you were riding in was the one just immediately ahead of the observation-car? A. It was.

Q. And did you see the accident itself? Were you there to see how it did happen? A. I did not.

Q. How did you know there had been an accident, or that Mr. Shellenbarger had been thrown from the train? How did you learn that?

A. Someone came to our stateroom and said so.

(Testimony of Mrs. Georgia H. Cheney.)

Q. Do you recall who that was? A. I do not.

Q. How soon after it happened did they say there had been a man thrown from the train?

Mr. ROCKWOOD.—I object to that; this witness can't tell.

COURT.—How soon after thrown from the train? How does she know.

Q. Do you know who it was that notified you there had been an accident? A. I did not.

Q. What did you do, if anything, after you learned there had been an accident?

A. I went out on the platform.

Q. Was that the rear platform of your car?

A. It was.

Q. And what was the situation there with respect to the vestibule and the steps?

Mr. ROCKWOOD.—I object to that, your Honor. It has not been shown that the condition at that moment was the same as when the accident happened.

COURT.—I think that is probably for the jury.

Mr. ROCKWOOD.—Save an exception.

COURT.—You can explain it, yes.

Q. Just what was the condition of the vestibule door, and the steps, when you saw it, on the rear of your car? A. The door was open.

Q. On which side of the train would that be, as you walked towards the engine?

A. Left-hand side.

Q. Left-hand side, and did you observe whether or not both [68—27] the door and the steps were open, or was it just the door only?

(Testimony of Mrs. Georgia H. Cheney.)

A. I can't say as to that.

Q. And at the time you observed this open door at the left side of the vestibule of the rear of this car, had the train stopped at Saco yet? That will give us some idea about how soon it was after the accident occurred?

A. I think it was slowing down for the station at that time.

Q. Hadn't stopped there on the siding at Saco?

A. I think not.

Q. When you observed the condition of this door; is that true? A. I think so.

Q. And then did you—now what had you been doing if anything just previous to your going out there and observing the condition of this vestibule door and steps? What were you doing just before that? A. Playing cards.

Q. And in your compartment of this car of yours?

A. Yes, sir.

Q. Right ahead of the observation-car?

A. Yes, sir.

Q. And who were you playing cards with?

A. Three other parties. Having a game of bridge.

Q. A game of bridge with Mr. Cheney, if I might lead a little bit? A. Mr. Cheney.

Q. And Mr. Freck? A. Mr. and Mrs. Freck.

Q. Mr. and Mrs. Freck, and the four of you were playing bridge in the compartment of your car, which was the first car ahead of the observation car? A. Yes, sir. [69—29]

Q. State whether or not, Mrs. Cheney, anything

(Testimony of Mrs. Georgia H. Cheney.)

unusual occurred with respect to the operation of the train, immediately prior to your going back there and observing this condition of this vestibule door; whether anything happened out of the ordinary?

Mr. ROCKWOOD.—I object to that, if your Honor please. I hate to make these objections constantly, but I object to that on the ground that the time is not fixed as being coincident with the accident.

Mr. DIBBLE.—I think the time is pretty well fixed, because the witness has already testified that at the time she observed the door to be open, that the train was slowing down to make this stop at Saco, to take the siding, which is shown to be about half a mile.

COURT.—I think that is for the jury.

Mr. DIBBLE.—So I think that is as close as we could get it there.

(Question read.)

A. There was a decided jerk to the train.

COURT.—What?

A. A decided jerk of the train, enough to throw me against the card-table.

Q. You were sitting down, playing bridge there—

COURT.—She has already testified.

Q. And state whether or not that decided jerk that you spoke of, was that just an ordinary swaying motion of the train? A. It was not.

Q. And how violent a jerk was it? Just tell the jury as clearly as you can, so they will appreciate the severity of it. [70—30]

(Testimony of Mrs. Georgia H. Cheney.)

A. It was forcible enough to throw me against the card-table; had not the table been there, I think I should have fallen on the floor.

Q. Supposing you had been standing up, or walking along, and had not been sitting down in your seat—

COURT.—That is not proper.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Mrs. Cheney, you say when you got to the platform the train was just going to stop at Saco?

A. It was slowing down.

Q. Now you of course have no way of telling when Mr. Shellenbarger fell from the train?

A. I have not.

Q. And you don't know how long after he fell from the train, this gentleman, whoever he was, came through and told you that Mr. Shellenbarger had fallen from the train?

A. After I felt that jerk, it must have been five or six minutes, when someone came in.

Q. Five or six minutes. When this gentleman came through to tell you about this, did you then immediately get up from the card-table and start out? A. If I remember rightly, I did.

Q. Of course you have no way of telling what happened with respect to the operation of the train between the time Mr. Shellenbarger fell off and the time when you were notified? A. I have not.

Q. You don't know whether or not somebody gave a signal to stop in between the time Mr. Shel-

(Testimony of Mrs. Georgia H. Cheney.)

Shellenbarger fell off, and the [71—31] time you felt this jerk, do you?

A. I don't remember hearing a signal.

COURT.—What?

A. I don't remember hearing a signal.

Q. I beg pardon?

A. I don't remember that I heard a signal.

COURT.—You would not have heard it probably if it had gone through to the engine.

Q. The question is, you have no way of knowing personally whether any such thing was done?

A. No, I have not.

Redirect Examination.

(Questions by Mr. DIBBLE.)

Just one little matter to clear up there. I think a little confusion. If as shown by the testimony it was half a mile there from where Mr. Shellenbarger fell from the train up to the siding there at Saco, where the train stopped, and if as you say, the train was still in motion and had not got to Saco yet when you went out, and there was an open vestibule door there, if that is true, it couldn't have been five or six minutes.

COURT.—Oh, no, no. She has testified to that.

Mr. ROCKWOOD.—The testimony of your own preceding witness is there was an intervening stop of the train.

COURT.—You can argue that to the jury if you want to.

Mr. DIBBLE.—I was busy talking with another witness, and I didn't get all your testimony, of

(Testimony of Mrs. Georgia H. Cheney.)

course. But I understood you said it was five or six minutes.

A. Five or six minutes.

Q. From the time this man fell from the train, until you saw [72—32] the open vestibule?

Mr. ROCKWOOD.—She didn't say that at all.

COURT.—No, no.

A. From the time someone came to my stateroom.

COURT.—Four or five minutes after she felt the jar of the train, before this man came to her stateroom.

A. After I felt the jar of the train.

Q. But after you felt this distinct jerk you spoke of, you said you went right then to this vestibule?

A. No, I did not. Not until someone said that someone had fallen from the train.

COURT.—Four or five minutes.

Mr. DIBBLE.—I believe that is all.

Witness excused. [73—33]

TESTIMONY OF D. B. STUART, FOR PLAINTIFF.

D. B. STUART, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

You live where, Mr. Stuart?

A. Corvallis, Oregon.

Q. Are you connected with the State College there? A. I am.

(Testimony of D. B. Stuart.)

Q. In what capacity?

A. Superintendent of Light & Power.

Q. You are a Knight Templar? A. I am.

Q. And were you on this Knight Templar Special at the time Mr. Shellenbarger was injured?

A. I was.

Q. You have heard the testimony of Mr. Cornell, the first witness we called? A. I did.

Q. Do you know him? A. I do.

Q. Do you recall whether or not you were on the rear of this observation train with him?

A. I was.

Q. How long was that before the accident, about?
Mr. ROCKWOOD.—Just a moment.

COURT.—What?

Mr. DIBBLE.—How long was that before the accident that you were on the back? [74—34]

COURT.—Does he know when the accident occurred? A. I think I do.

COURT.—We don't want any "think" about it, because that is the important question in this case.

Mr. ROCKWOOD.—I have no objection to his stating how long he had been on the platform prior to the time he heard of the accident.

COURT.—Certainly, that would be all right.

Mr. DIBBLE.—That is what I was asking.

Q. You recall being at the rear of the observation platform or the observation car, with Mr. Cheney and his wife? A. Yes, sir.

Q. Were you riding there at the time the accident occurred? A. I was.

(Testimony of D. B. Stuart.)

Q. You didn't actually see the accident then?

A. Couldn't.

Q. How soon would you say it was after the accident occurred, that you knew it had occurred?

COURT.—You have asked that question two or three times. How can he know how soon it was after the accident occurred?

Mr. DIBBLE.—I thought the brakeman came through.

COURT.—He can testify when he was told of the accident.

Q. That is what I mean. State whether or not anybody in connection with the train *and* said an accident had happened?

A. A man in train uniform came running back to the vestibule of the observation car, I mean the extreme rear now, of the observation car, and he says, "My God, a Sir Knight went overboard!" as I remember. Maybe he said fell overboard, but it had something to do with the fact that a Knight Templar [75—35] had left the train.

Q. Was this man you spoke about being in uniform, was he running or walking through the train?

A. He was getting back to the rear of that train just as fast as he could.

Q. State whether or not the train was in motion at that time. A. It was.

Q. And where did he go, this man, that is. Did he go to the back end?

A. Now ask me that again, will you please?

(Testimony of D. B. Stuart.)

Q. Where did he go as he came through the train? Did he go to the back end of the observation-car?

A. You have reference to this—

COURT.—The brakeman.

A. He was going to the rear of the train, yes.

Q. What did he do, and what did you do?

A. I don't know what he did.

Q. What did you do?

A. I vaulted over the back of the train and started running back.

Q. Now, I wish you would state, Mr. Stuart, whether anything unusual occurred with respect to the operation of the train, immediately prior to the time that this brakeman, or this man in uniform, came through the observation-car saying—whatever it was—"My God, a Sir Knight has fallen off the train!" Did anything unusual occur there before his coming in there to make this statement?

A. Mr. and Mrs. Cornell and—

COURT.—Did anything unusual occur? That is what we [76—36] want to know, and if so, what was it?

A. Mr. and Mrs. Cornell and myself were in conversation—

COURT.—That hasn't anything to do with it.

Mr. ROCKWOOD.—Not responsive.

A. And during that conversation there was a change in the rhythm of that train's progress.

COURT.—How long was that before the brakeman came in and told you about the accident?

(Testimony of D. B. Stuart.)

A. My opinion is that it was about the length of time it would take a man to run and make that.

COURT.—Never mind about that. In minutes,—can't you tell in minutes?

A. No, sir, I can't. I would rather not state that; I don't think it was a minute.

Q. What if anything did you do when you noticed this change of rhythm? Did you do anything to find out what was the cause of it?

A. I stepped to the left side of the platform—of the observation platform of the car, and looked ahead.

Q. Previous to this time had you been explaining to Mrs. Cornell about the signals, operation of the train, etc.?

A. The electrical part of it, to Mr. and Mrs. Cornell, yes.

Q. Are you familiar with that?

A. I was familiar with the blue-print construction of it.

Q. At the time this change of rhythm of the train occurred, were you standing up or sitting down?

A. I was standing.

Q. And at the time it occurred did you know what it was that caused it? A. No, sir. [77—37]

Q. Is that the reason you went around to the back of the car to look ahead and see?

A. Yes, sir.

Q. Was it the ordinary movement of the train then? A. No, sir.

Q. And how violent a change of rhythm, as you

(Testimony of D. B. Stuart.)

call it, was there? How extraordinary was it? How violent was it?

A. I don't believe I know how to answer that question accurately and intelligently, I want to answer it as honestly as I can; I don't know the means of describing that.

Q. State whether or not the thing that happened there was just the ordinary swaying movement of a train when it is being properly operated, or was it an extraordinary movement of the train?

Mr. ROCKWOOD.—I object to that, because it calls for a conclusion of this witness as to what is proper operation.

COURT.—I think so. You can tell what effect it had on you.

Q. What effect did it have when you were standing there?

A. I was leaning against the rear railing of this observation platform.

COURT.—Did it disturb you in any way so you swayed to one side or the other?

A. In truth I don't know, for immediately when this interruption of this train's movement came, I went to the left and looked ahead like that, and remarked something to this effect to Mr. and Mrs. Cornell, that I wondered what had happened.

Q. Your purpose in going there, looking ahead, was to find out what had caused this movement you spoke of? [78—38]

Q. Is that true? A. That is true.

Q. And you couldn't tell from standing there,

(Testimony of D. B. Stuart.)

what had caused it, but you would go around and look and see what did cause it.

A. I stepped to the left side of that platform and looked ahead, and seeing some lights there, assumed we were coming into a depot of some sort, and I didn't even know where we were. It was dark.

Q. When you got off the train were you the first one that got off?

A. I believe I was; yes, sir.

Q. Did you go back to where Mr. Shellenbarger was? A. Yes, sir, I went back to find him.

Q. Where was he found? Describe that briefly.

A. There were two tracks, one track our train was on, heading east. There was a track to my right as I ran back. Mr. Shellenbarger was between the two.

Q. Was he conscious or unconscious at the time?

A. Oh, no, he wasn't conscious.

Q. What was the condition of the roadbed there, was there mud there, some soft mud, or hard ground?

A. It was not hard ground. I reached the conclusion that it was a fill of some sort, and that it was not dry land.

Q. Did you notice his condition, was he bleeding?

A. I did not at that time know anything about any blood. I learned of it later. But I personally did not know of any blood at that time. I was more concerned as to whether his legs, arms, or any portion of his body was broken.

(Testimony of D. B. Stuart.)

Q. Did you assist in having him taken to an automobile? [79—39] A. Yes, sir.

Q. And who took him into the car, the automobile?

A. I would assume it was Mr. Freck and Mr. Cheney, but I do not know. It was dark. I know they were present. I know I helped. I tried to steady him as we came back along the road to this little town of Saco.

Mr. ROCKWOOD.—When was that? Was that after they came back to Saco that Mr. Freck and Mr. Cheney helped with him? Or had they got back to where he was lying?

A. Mr. Freck and Mr. Cheney were on the train. Now I am assuming that train to be stopped at Saco. I don't know when that train stopped. They stepped off this train and commandeered, to put it in a word, a man with an automobile at the station.

COURT.—That is not back where you found Mr. Shellenbarger?

A. No, sir, not when we stepped off the train.

COURT.—That is what counsel wants to know.

Q. How did you get back to the train again?

A. I went back in the car that Mr. Cheney and Mr. Freck drove up there.

Q. Went right along with Mr. Shellenbarger?

A. Yes, sir, was holding him in the car this way, trying to keep him from all the jar possible, and we were hurrying to get back.

(Testimony of D. B. Stuart.)

Q. Where was the train when you reached it? Where was it standing?

A. It was stopped across the street, as I remember.

Q. Was it on the siding, or the main line?

A. I don't know.

Q. Was it off the main line? [80—40]

A. I don't know, because we merely put Mr. Shellenbarger in the baggage-car and turned him over to some physician. I don't know where the train was. I paid no attention.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

I just want to get this perfectly clear. You had been on the observation platform with Mr. and Mrs. Cornell for some little time, some half an hour or so before the accident happened?

A. I would think it was longer than that.

Q. And very shortly before this train man came through to say that a Sir Knight had fallen overboard, you were leaning against the rear railing of the observation platform. Is that correct?

A. That is correct.

Q. And facing towards the front of the train?

A. Facing as we were traveling. I was facing towards the engine.

Q. Looking through the doors into the inside of the observation car?

A. In that direction, yes; I was facing that way.

Q. Then you were conscious of a change in the rhythm of the movement of the train?

(Testimony of D. B. Stuart.)

A. Yes, sir.

Q. And shortly after that a man came through and told you that a man had fallen overboard?

A. Yes, sir.

Q. Between the time that you were conscious of this change in rhythm, and the time that the man came through, you stepped over to the left or north side of the train, and glanced out. [81—41] Is that correct? A. To my left, yes, sir.

Q. Well, if the train were running east, that would be to the north side of the track. That is correct, is it? A. It would, yes.

Q. And do you remember after glancing out, did you go back to your position, or did the man come through at about that instant?

A. I don't know; there was quite a bit of confusion there. I don't know.

Q. Now, you say a change in the rhythm. The train had been running along on the main line prior to this change in rhythm. Is that correct?

A. I believe it to be, yes, sir.

Q. And the change in rhythm didn't knock you down, did it?

A. It couldn't. I was braced against the railing.

Q. You were leaning against the back rail on the train. Did it throw you to one side or the other of the platform? A. I don't remember.

Q. It wasn't a sufficient jerk so that it made any material impression on your mind, except that you probably were coming into a station. Is that correct?

(Testimony of D. B. Stuart.)

A. No, I don't quite believe that is a statement of fact.

Q. That was the conclusion you drew when you felt this change in rhythm. Is that correct? So you went up to see? A. No, it was abrupt.

COURT.—What?

A. It was an abrupt change in the motion of this train.

Q. Now, on a train you have felt such an abrupt change as that many times, haven't you—riding and walking in and through trains? [82—42]

A. I don't think quite as abrupt as that occurrence, no.

COURT.—You mean by "abrupt" such as would occur if the train stopped suddenly, or attempted to stop suddenly?

A. I believe that would partially explain it, yes. I thought they had made a sudden attempt to stop.

Q. You don't know, of course, Mr. Stuart, whether between the instant Mr. Shellenbarger actually fell off the train, and the moment the brakeman told you that a Sir Knight had fallen overboard, whether anybody had given any signals to the trainmen or whether any change in the movement of the train had occurred, do you?

A. I do not know that any signals had, or had not been given.

Q. You don't know whether Mr. Shellenbarger fell off before or after this change in rhythm that you refer to. You don't have any personal knowledge? A. No, I don't think I could have.

(Testimony of D. B. Stuart.)

COURT.—Didn't some witness say he thought Mr. Stuart gave a signal from the bell-rope?

Mr. DIBBLE.—No, Mr. Sawyer.

Redirect Examination.

(Questions by Mr. DIBBLE.)

State whether or not there were some signals given when the brakeman came through and said a Sir Knight had fallen off; there were some signals given to stop the train, weren't there? Somebody pulled the cord.

A. To save me I don't know why I should. I started running back with the brakeman's lantern.

COURT.—You don't know about it?

A. I do not. I gave some signals with the lantern, in attempting [83—43] to bring the train back; but it continued on. I learned afterwards it did that to pass another train, or to permit another train to pass it.

Q. You didn't pull the cord to stop the train?

A. No, sir, I touched no cord. I was right over the back of that train as soon as I heard.

Witness excused.

Recess until 2 o'clock. [84—44]

Thursday, Dec. 11th, 1930, 2 P. M.

TESTIMONY OF MRS. J. L. FRECK, FOR
PLAINTIFF.

Mrs. J. L. FRECK, a witness called in behalf of plaintiff, being first duly, sworn, testified as follows

Direct Examination.

(Questions by **Mr. DIBBLE.**)

Mrs. Freck, have you ever been a witness before?

A. No, sir.

Q. This is your first experience? A. Yes, sir.

Q. This is the jury right here, and they want to know the facts; and the Judge sits there by your right. You live in Portland? A. Yes, sir.

Q. And about how long have you lived here, Mrs. Freck? A. Since 1911.

Q. And you are the wife of J. O. Freck?

A. Yes, sir.

Q. And you have some business here in Portland?

A. Yes, sir.

Q. What business do you conduct?

A. We have a stationery and office supply store.

Q. Where is that located?

A. 185 Sixth Street.

Q. And will you state, Mrs. Freck, and keep your voice up so these gentlemen can hear you—state whether or not you were on this Knight Templar Special at the time Mr. Shellenbarger fell from the train? [85—45] A. I was.

Q. You and your husband were making the trip?

(Testimony of Mrs. J. L. Freck.)

A. Yes, sir.

Q. Back to the Convention, were you?

A. Yes, sir.

Q. Do you know Mr. Shellenbarger, the plaintiff? A. Yes, sir.

Q. How long have you known him, about?

A. Off and on for the last ten or twelve years.

Q. And which coach of the train was your compartment in, if you remember?

A. We had our compartment in the last coach, in the observation car. The train we had at that time had I think two or three compartments in the last coach.

Q. When you say the last coach you mean the coach immediately ahead of the observation car?

A. No, it was in the observation car coach; it was divided. We had our compartment in that coach, that is, Mr. Freck and I did.

Q. Now, state whether or not you actually witnessed the accident? Did you see Mr. Shellenbarger fall from the train? A. No, sir, I did not

Q. What was the first notice you had that there had been an accident?

A. We were visiting in another compartment in the coach ahead, and some party stepped to the door, pushed it open, and said, "We have lost a Sir Knight."

Q. Now, at the time that that notice was given, you were, if I understand you, then in the coach immediately ahead of the [86—46] observation car? A. We were in that coach at that time.

(Testimony of Mrs. J. L. Freck.)

Q. At that time. And what were you doing there? Who was with you?

A. We had had a social evening of playing cards for a few hours anyway.

Q. And you were playing bridge there in that coach? A. Yes, sir.

Q. And who was playing at the table with you?

A. Mrs. Cheney was at the table opposite me, and I believe Mr. Cheney was at the side of her, if I remember correctly.

Q. And who was the fourth member of the party?

A. Mr. Freck was in the seat I believe opposite him, or else it was the other way; I couldn't say for sure.

Q. Now, will you state, Mrs. Freck, whether after this person stopped and said that a Sir Knight had fallen from the train—state what, if anything, you did immediately thereafter, after that was said?

A. Well, the men folks immediately rushed, and we women folks as fast as we could follow.

Q. And how soon did you rush out yourself after this announcement had been made?

A. Right immediately.

Q. Just a matter of a few seconds, was it?

A. It wasn't so long a time. I wouldn't say how long a time; it didn't take very long, because were only out—it was at the back end of the second coach, you see, and we only had a few steps to go to the opening, or to the hallway, or whatever you call it, vestibule, I guess they call it; the regular [87—47] trainmen do.

Q. State whether or not the train was still in

(Testimony of Mrs. J. L. Freck.)

motion when you went back there immediately after this announcement.

A. The train was still in motion, I am sure.

Q. And about how fast was it going?

A. That I couldn't say; just ordinary speed, I guess.

Q. When you went back there after this announcement, state whether or not the train had arrived at Saco as yet, at this station or siding?

A. Well, it was dark, I couldn't say as to that; but I am quite sure the train was in motion, and I believe we were on the side track, but not yet at the station, as the train was still moving, and if it had been at the station and in the clear, I think we would have been at a standstill, which we were not.

Q. Was the train at any time, as far as you know, stopped after the accident occurred, until the time when it finally stopped there at Saco to allow the other train to pass it?

A. I think not. I am quite certain that it was in continuous motion all the time.

Q. As far as you know, there was no emergency stop made at any time by the train after Mr. Shellenbarger fell from it? A. I think not.

Q. Now, when you went back there, which you say was immediately after this announcement that a Sir Knight had fallen from the train, the train was still in motion and was not yet at Saco, what condition did you find the vestibule of that coach to be in?

(Testimony of Mrs. J. L. Freck.)

Mr. ROCKWOOD.—I object to that, your Honor, because [88—48] there is nothing to show that the condition at that time was the same as at the time of the accident.

COURT.—I think she can testify.

A. Want me to answer the question?

COURT.—Yes.

Mr. ROCKWOOD.—Save an exception.

A. When we rushed out into this vestibule the men folks were first, and I was right after them, and the trap was open, and the door was open.

Q. And on which side? On which side of the vestibule was the opening with respect to the direction the train was going?

A. Well, as far as my sense of direction is concerned, I think it was on the left side.

Q. If a person were passing from the observation-car to go into this coach that you had been playing cards in—if they were undertaking to pass from the observation-car to go up towards the engine, this vestibule door that you speak of as being open, would be on that person's right or left hand side?

A. Going straight east as we were going, I would say that that vestibule was on the left-hand side.

Q. And now then, I wish you would state to the jury whether or not prior to this announcement being made that a Sir Knight had fallen from the train—state whether or not there was anything unusual that you observed in the movement of the train.

(Testimony of Mrs. J. L. Freck.)

A. Just a few seconds before the announcement was made there was a very sudden, and I would say rather violent lurch. I was sitting with my back to the engine, and in attempting to describe the lurch, it would throw me backward like this, and the party in front of me was suddenly pushed forward against [89—49] the table; we had a card-table between us.

Q. And Mrs. Cheney was sitting opposite you?

A. Yes.

Q. At the table?

A. Yes, we were on the inside next to the windows, and she was opposite me.

Q. As Mrs. Cheney was riding she was facing in the direction the train was going, as I understand you? A. Yes, sir.

Q. What effect, if any, did this sudden lurch of the train have upon Mrs. Cheney, and have upon yourself? A. Well, she said at the time—

Mr. ROCKWOOD.—Just a moment.

Q. Not what she said, but what you observed, if anything, in her movements, or what effect it had upon her from what you saw. Not what she said, but what you may have seen.

A. Well, she was rather disturbed.

Q. And you were all seated at the table at the time this occurred? A. Yes, sir.

Q. Now, in what way was she disturbed? That is rather a general term. These gentlemen here they want to know what sort of lurch of the train it was, if there was one. How much did it disturb her?

A. She was thrown forward this way against the

(Testimony of Mrs. J. L. Freck.)

edge of the table, and I would say that she was made rather uncomfortable from feeling the edge of the table against her abdomen, at least she mentioned it at the time—I wasn't supposed to say that.

Q. What would you say, Mrs. Freck, as to whether or not this [90—50] lurch of the train which you have described—state whether or not that was just an ordinary lurch or swaying of the train that might ordinarily occur in the ordinary operation of it, or whether it was an extraordinary and more violent jerk?

A. Well, I would say it would be in the nature of a jerk or lurch similar to when you are riding in a car and you are stopped suddenly, or attempt to stop suddenly.

Q. Mrs. Freck, just answer my question if you can, as to whether or not it was just the ordinary swaying of the train, or an extraordinary lurching of it?

A. It was not the ordinary swaying of the train, it was a lurch forward.

Q. Had you seen Mr. Shellenbarger during the evening prior to this occurrence, had you seen him about the train? A. I had.

Q. And was he in good spirits as far as you observed? A. I should say he was.

Q. And appeared to be about the same as you had known him in your previous years of acquaintance with him? A. I should say so.

(Testimony of Mrs. J. L. Freck.)

Cross-examination.

(Questions by Mr. ROCKWOOD.)

This was the car in which you were riding—

Mr. DIBBLE.—Pardon me just one moment, if you please. I did overlook to ask one thing, Mr. Rockwood. Now, you have spoken of the lurch of the car, as you have described it there. State whether or not there was any other sudden stopping of the train that you were conscious of, following that lurch that you have spoken of; if there was a second lurch? [91—51]

A. There was no sudden stop, but there was another sudden jerk.

Mr. DIBBLE.—There was. How long was that after this first jerk that you have mentioned?

A. That jerk I would say was very shortly after.

Mr. DIBBLE.—That would be as you got nearer to Saco to make the stop there, would it, that second lurching?

A. I presume so.

Q. (Mr. ROCKWOOD.) This car, Mrs. Freck, that you was riding in, was the first Pullman car ahead of the observation car. Is that correct?

A. That is the car we were in.

Q. The one you were riding in at the time?

A. At that time, at the time the announcement was made.

Q. And that car, do you recall the general nature of that car? Was it a solid compartment car, or were there open berths in that car?

A. Well, to tell you the truth, I don't remember.

(Testimony of Mrs. J. L. Freck.)

Q. Do you remember whether the *statement* or compartment in which you were riding at that time, was on the north side of the train, or the south side of the train, as it was running east?

A. Well, I don't recall.

COURT.—Was it the right or left hand side of the car?

A. To the right or left?

COURT.—As you were going.

A. Going east—well, going east, if I am not mistaken. I think the compartments of that coach were on the south side.

COURT.—On the right-hand side?

A. I am not sure, but I think they were; it seems to me the [92—52] passageway was on the left side.

Q. Was on the north side, that is, the left-hand side of the train, the passageway? The same side of the train with this vestibule that you are talking about? A. I think so.

Q. So that when you got up to go—

A. So long ago, I can't remember.

Q. So when you got up out of your seat, when this gentleman made the announcement, you went towards the north or left-hand side of the train, and into the hallway, and turned to go towards the rear of the train. Is that right?

A. How did you say that?

Q. When you got up out of your seat to go towards the vestibule, you went towards the passageway on the north or left-hand side of the train and

(Testimony of Mrs. J. L. Freck.)

then turned and went back towards the rear of the train?

A. I don't think we went—as I remember it, their apartment was in the end of that coach, and we didn't have very far to go, we just had to go that step right out of their doorway into the little hall, and then almost straight ahead. We didn't have to turn around very much. Was back a little bit, you see.

Q. Let me get it. Here you stand in the door?

A. Yes.

Q. You had gotten up out of your seat and walked towards the door, which is a step?

A. Yes, sir.

Q. Then you turned towards your left and right into the passageway back towards the rear of the train? A. Yes, sir. [93—53]

Q. That is the way it worked, wasn't it?

A. If I get you right, that is the way it was.

Q. And you say that the first jerk, the one that bumped Mrs. Cheney, came just a few seconds before you heard from this man that somebody had fallen overboard?

A. That is what I would say.

Q. And then some time later there was a second jerk. Now that second jerk, did that come before or after you got out of the compartment?

A. Before.

Q. Before you got out of the compartment?

A. Yes.

(Testimony of Mrs. J. L. Freck.)

Q. So there was jerk; in a few seconds a man came— A. It was right after that.

Q. Right afterwards. Somebody said a man had fallen off? A. Yes.

Q. And in another few seconds there was another jerk, before you had time to get out of the room?

A. Yes, before he even had time to get out.

Q. Before he left the door. Is that right?

A. I think he was in the doorway, or at the end of the hall there some place.

Q. You don't recall who that man was?

A. No, I don't; I didn't know the men very well.

Q. Mr. Cornell was talking about a stop of the train between the time he jumped off and between the time it stopped on the passing track at Saco. You don't remember any such stop, do you?

A. No, I don't.

Q. So the only stop that you recall is the stop at the [94—54] station, when you were on the side track?

A. That is the only one I can recall as a full stop. I think at the second jerk, or second slowing down, was almost a stop, but I wouldn't say it was.

Q. Did you get off the train? A. No, I did not.

Witness excused. [95—55]

TESTIMONY OF CHARLES KAUFMAN, FOR PLAINTIFF.

CHARLES KAUFMAN, a witness called in behalf of plaintiff, being first duly sworn, testified as follows:

(Testimony of Charles Kaufman.)

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Kaufman, where do you live?

A. 28 East 44th Street, Portland.

Q. And what is your business?

A. I am in the postoffice, as a clerk.

Q. How long have you been in the postal service? A. I am in my twenty-second year now.

Q. Twenty-two years in the service?

A. Yes, sir.

Q. Right here at Portland? A. Yes, sir.

Q. Do you know Mr. Shellenbarger? A. I do.

Q. The plaintiff in this action? A. I do.

Q. How long have you know him?

A. Ever since I have been in the service.

Q. And for how long a time would you say you had worked for him prior to his injury, which the testimony shows occurred on the 12th of July, 1928—the 13th of July, I should say, rather?

A. About fourteen or fifteen years.

Q. You have worked with him in the service?

A. Yes, sir.

Q. And state what his capacity for work was during those years [96—56] that you knew him, prior to this injury he received?

A. Why, he was perfect.

COURT.—He was perfect?

A. Yes, sir.

Mr. ROCKWOOD.—That is a pretty strong statement.

(Testimony of Charles Kaufman.)

COURT.—You will have to speak louder. He says he was perfect.

Q. In his capacity to work? A. Yes, sir.

Q. Was he superintendent at that time of his station?

A. Well, he had various jobs since I knew him, but the fourteen years I worked for him, he was superintendent of his station.

Q. He was superintendent?

A. He was superintendent of his station.

Q. During those fourteen years? A. Yes, sir.

Q. And do you recall his return to work at the station, I think in April, 1929?

A. What is it you say?

Q. Were you working there at the station when he returned to work? A. Yes, sir.

Q. What was his condition then when he returned to work, and what is his condition now, as you have observed it?

A. Well, prior to his coming back to work the superintendent at the station requested me to help carry *him* part, because he wanted to come back to work, and so us boys—rather we would help him in every way we could, on account of his inability to concentrate and come in and— [97—57]

Mr. ROCKWOOD.—Just a moment; please don't repeat the conversation you had with your superior.

COURT.—Counsel asked what his condition was after he came back.

Mr. ROCKWOOD.—Just this man's observation.

A. Poor; I should say poor.

(Testimony of Charles Kaufman.)

Q. We can't hear you, Mr. Kaufman.

A. Poor; I would say poor.

COURT.—What do you mean by “poor?”

A. Well, he dragged his feet, and he couldn't remember, and similar things like that.

Q. State whether or not prior to this accident you would take up with him matters pertaining to the department, for advice, etc.

A. Yes, sir, and not only us, but superintendents of other stations would occasionally call up for technical information, things he knew.

Q. How has it been since this accident; since he returned to work do you apply to him the same way?

A. No, sir, none of the boys that work for him go back to him for information.

Q. Why don't they?

A. Because he hasn't got it in him any more, he doesn't know it, he has lost it.

Q. What is his condition as to being nervous, or otherwise?

A. Why, absolutely nervous as could be. I seen him have to close the window and ask for relief because he was so nervous he couldn't go ahead when the work was rushed.

Q. Have you noticed anything about his condition of memory?

A. Oh, lots of times. One instance, I seen lots of instances, [98—58] but this is one where, for instance, the telephone bell rings, and at the time the telephone rings he was listing up his money orders.

(Testimony of Charles Kaufman.)

He goes and answers the telephone, and then perhaps someone on the telephone wants to know whether we carry so many thousand envelopes, or something, on hand; if not, they would go to the main office. So he would go over to the stamp clerk and ask the stamp clerk whether or not he carried that much. By the time he went back and answered the telephone he would forget all about the work he was doing, and go about something else, and leave his work lying there. For instance, I seen where he answered the telephone and went over to one of the boys to find out some information, and on his way back another one asked him about Saturday time off, and instead of going back and answering the telephone he just went about his business like nobody ever—left the receiver down. And another thing is, I have seen him enclose the wrong enclosure in the wrong envelope, lots of time since he come back.

Q. Well, from the condition which you observed him in, from the time he has returned to work since this accident, what would you say as to whether or not he is able and really should be working or not? A. He should not.

Mr. ROCKWOOD.—Just a moment. I object to that as calling for a conclusion of a lay witness.

COURT.—Let him describe his condition, and let the jury say that.

Mr. DIBBLE.—Yes, I think that is probably true.

Q. State whether or not you have observed anything in his [99—59] appearance there while at

(Testimony of Charles Kaufman.)

the station, indicating any pain or suffering on his part?

A. I have seen him lay down on the—lay his hand on the desk and hold his head, time and time and time again; although never complaining to me, I knew well enough that the man was so sick he shouldn't have been working; and on several occasions I went over and pulled his window down to be able to do part of his work as long as I wasn't too crowded, so as to give him a chance to rest his head.

Q. Has he complained of any headache, or things of that sort?

A. Yes, he has complained to me had a headache.

Q. How does he seem to get along, does he seem to be getting any better?

A. No, sir, on the contrary, I think.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

But since he has come back—when did he come back, after the accident, do you recall?

A. What month, you mean?

Q. Yes. A. I think it was in April.

Q. What?

A. I think it was in April, if I remember right.

Q. But you are not sure of that time?

A. No, sir.

Q. It was some time in the spring of 1929?

A. Yes, sir.

Q. Or late winter?

(Testimony of Charles Kaufman.)

A. No, it was early in the year, because it was after the holiday rush. [100—60]

Q. I say, in the late winter, or spring, of 1929?

Mr. DIBBLE.—It wasn't late winter, because it was after the holidays.

A. It was early in the year; wasn't fall; wasn't late in the year, was early in the year.

Q. You don't understand. I say, late in the winter or early in the spring of 1929? A. Yes.

Q. And since he has come back he has been fairly regular on the job, hasn't he?

A. He has, yes, sir.

Q. And as far as you know there hasn't been any absences from the work because of inability to work? A. No, sir.

Witness excused. [101—61]

TESTIMONY OF W. G. SHELLNBARGER, IN HIS OWN BEHALF.

W. G. SHELLNBARGER, the plaintiff, being first duly sworn, testified in his own behalf as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

You are the plaintiff in this action?

A. I am.

Q. And what year did you come to Oregon?

A. 1893.

Q. And have you been living in Oregon ever since? A. I have.

(Testimony of W. G. Shellenbarger.)

Q. And what has been your capacity, so far in your lifetime, during the last, say fifteen or twenty years?

A. Well, I been working with the postoffice; the last fifteen years I have been in charge of the station on Oak Street.

Q. And where is the station located that you are now employed at?

A. Near Third Street, on Oak.

Q. Near Third and Oak. And state whether or not you have held any positions in Masonry, which require you to do what we call ritualistic work, memory work? A. I have.

Q. And what positions in the Fraternity have you held of that character?

A. Well, most every position in the Fraternity, from the lowest to the highest in the state.

Q. Were you ever Worshipful Master of your own Blue Lodge? A. Yes, twice.

Q. What Lodge is that? [102—62]

A. Washington 46.

Q. How many times have you been its Master?

A. Twice.

Q. State whether or not you have ever been Worshipful Master of the State of Oregon.

Mr. ROCKWOOD.—I don't think that is very material, if your Honor please.

COURT.—I don't think it is necessary to go into that.

Q. No, but this work you spoke of has required memory work on your part, has it?

(Testimony of W. G. Shellenbarger.)

A. Yes, it has.

Q. And at the time you were on the train you were, of course, going to attend this conclave of the Knight Templars at Detroit, Michigan?

A. Yes.

Q. Is that true, and since the accident which befell you, state to the jury what has been your ability to do this ritualistic work, this memory work?

A. Well, I can't do it at all, I can't do anything of that kind.

Q. Why? A. Because I can't remember.

Q. Now, the train that you left on, left from Portland, Oregon, did it? A. Yes, sir.

Q. And this accident to you occurred about what time, as near as you can say, in the evening?

A. About ten-thirty, or a quarter to eleven.

Q. What part of the train did you have your berth in, or your sleeping place?

A. Why, I think I was in about the third or fourth car from [103—63] the rear.

Q. There was an observation-car on the rear of the train? A. Yes, sir.

Q. As has been testified here, and your sleeper was some cars ahead of that, towards the engine. Is that true? A. Yes, sir.

Q. Now, during the day of the 12th of July, after you left Portland, during that day of the 12th of July, 1928, and during the evening of that day, and during the 13th of July, 1928, up to the time that you met with the accident, state whether or not you

(Testimony of W. G. Shellenbarger.)

had occasion to go back and forth through the train? A. I didn't get that question.

COURT.—After you left Portland, and before the time of the accident, did you have occasion to go back and forth through the train?

A. Oh, yes.

Q. And it is admitted this was a vestibule train. I want to ask you if at any time while you were riding on the train, up to the time you were injured, were the vestibules ever open except at stations? A. No.

Mr. ROCKWOOD.—I object to the form of that question; ask whether he saw any.

Q. Well, did you ever see any time when you were not at stations discharging passengers, when they left the vestibule doors open between the cars?

A. Only except at stations.

Q. Only except at stations. And you passed back and forth through the train on the 12th and 13th of July, 1928, before the accident happened, just as your convenience required, did you? [104—64]

A. Yes, sir.

Q. You had no difficulty of any sort? A. No.

Q. No accident, or anything of that kind. Now, I want to ask you, Mr. Shellenbarger, generally about your condition of health before this accident occurred. Have you had any sickness to speak of in your lifetime, before receiving these injuries? If so, tell the jury what that has been.

A. No, I never had any sickness of any duration; perhaps a toothache, or something of that kind, for

(Testimony of W. G. Shellenbarger.)

a day or two; but nothing that would confine me to bed for any length of time.

Q. You had the whooping-cough? A. Yes, sir.

Q. And have you had the measles?

A. Yes, as a child.

Q. Did you ever sustain a fracture to one of your legs? A. Yes, sir.

Q. How old were you when that happened?

A. About thirteen.

Q. And which leg was that? A. My right.

Q. Aside from these matters that I have called your attention to, have you had any sickness or incapacity of any sort? A. No.

Q. And this injury to your leg which you received when you were thirteen, and you are now how old—how old are you? A. About sixty-three.

Q. Has that affected you in any way since receiving it? A. No.

Q. Recovered from that, have you? A. Yes.
[105—65]

Q. Now just ahead, if you will, and briefly tell the Court and jury all that you remember concerning the happening of this accident, up to the time that you were thrown from the train—just briefly. Maybe I might ask you this question: Where had you been? In what part of the train had you been before you met with the accident?

A. I was in the observation-car.

Q. And while you were in there what were you doing?

A. Oh, just to have a little—spending the time

(Testimony of W. G. Shellenbarger.)

socially with some of the men, talking with some of them; it wasn't bedtime yet. I had no chance to walk around or exercise except through the train, and I was back there, and we had been talking about various things.

Q. About how long had you been back in the observation-car, as distinguished from your own coach, before the accident happened?

A. Oh, I should judge twenty minutes to half an hour.

Q. And where were you going, if any place, or what were you undertaking to do at the time the accident happened?

A. I was going back to go to bed, retire for the night.

Q. And just go ahead and tell what happened to you.

A. Well, I started back through the observation-car. I was sitting back pretty well to the rear of the car; there were some others there, and we had been talking, and I got up and started; I think some had—one or two had maybe gone ahead; I don't remember about that. I went—started back, and I noticed the usual swaying of the train; of course I had to be careful about that; then before I got to the—between the cars—I can't think.

[106—66]

COURT.—Vestibule? Door?

A. Vestibule. I noticed that there seemed to be more than the usual amount of movement to the train, but I went on. I thought well, it is only mo-

(Testimony of W. G. Shellenbarger.)

mentarily, and when I got in between the cars, passing through the vestibule, and went to go to the next coach, why, there was a lurch, a sudden lurch of the train that threw me. I lunged forward. I don't remember whether I struck the train or not, but I didn't have any feeling of striking anything or touching anything, but I just felt myself going, and I wondered where I would strike, wondered what it was like out there. You know how a man will do when he is going through space, and wondering what he is going to strike on. You live a long time there in a few seconds, and that is what I did. That is the last I can remember.

Q. What is the last thing you remember before the accident?

A. I was going through space. Practically that is the only way I can express it.

Q. And you were going toward *to* your coach to retire. Which side of the train were you thrown on? Which way were you thrown?

A. I think I was thrown towards the left side.

Q. Now, then, state whether or not you had any notice or warning from anybody that there was an open vestibule on that coach that you were seeking to enter.

A. No, I didn't see anybody there, and I didn't hear anybody. I didn't hear anybody say anything.

Q. Was there any barrier of any kind there?

A. No.

Q. Was there any light of any sort there; any

(Testimony of W. G. Shellenbarger.)

red lantern [107—67] on the platform floor, to indicate there was danger on that side of the train?

A. No, I didn't notice anything of that kind.

Q. Did you notice anything there except the ordinary lights of the vestibule?

A. Just the ordinary passage between the cars.

Q. As you were undertaking to pass between the cars, did you know that—if it turns out to be a fact, as they say it is now—did you know at that time that this vestibule door on the left was open?

A. No.

Q. And now as you passed from the back end of the observation-car, making your way forward to the front of that, and from there on to the next platform, you say that there was the ordinary swaying of the train? A. Yes, sir.

Q. But that didn't—did that throw you down or injure you in any manner? A. No.

Q. And then when you were passing on to the platform of the rear of this coach, then this other lurch of the car that you are speaking of?

A. Yes.

Q. Now then, just tell the jury, Mr. Shellenbarger, how that lurch that occurred there compared with this swaying that you have been speaking of, that you noticed as you were walking up through the observation-car; was it the same kind of a lurch?

A. No. Take the ordinary swaying of the car, you can balance yourself as you walk along, but this movement of [108—68] the car was such that

(Testimony of W. G. Shellenbarger.)

you couldn't protect yourself, that is, it was violent, I would call it,—well, different; was much stronger—well, it wasn't a swaying; it was a kind of a lurch. You lose your—you can't gain your—you can't gain your balance for a short time.

Q. Will you state to the jury where you were as far as you know when you came to, after the accident.

A. Well, I was in a hospital of some kind, hospital bed, or I don't know whether was in bed or on a stretcher or what; some kind of piece of furniture to lie down on anyway, and they seemed to be pulling at my clothes or something, and that is the first I remember. I asked them what was the matter but they said—the doctor told me to keep still, never mind, they would tell me later, and he wouldn't explain anything, and I wasn't—I didn't know very much anyway. I didn't seem to understand where I was or why I got there. He says, "We will tell you about it later." And that was along in the afternoon, I should judge, of the day after. I know—I didn't feel fully myself. I couldn't think of things or know what had happened, or anything until some time the next day. After the night had passed, the doctor came, and I seemed to be in much better condition, and so he told me what had happened. I asked him if anybody else was hurt, and he said no, that I went off the train by myself; that I was thrown off the train.

Q. Have you since learned what this place is, the name of it? A. Where this hospital was?

(Testimony of *W. G. Shellenbarger.*)

Q. Yes.

A. Yes. It is—I can't think of it now. [109—69]

Q. Well, it is admitted here; we will help you out on that. It is admitted it was Glasgow, Montana.

A. Yes, Glasgow, that is the name.

Q. Do you know about how long you were confined there? A. I think about nearly two weeks.

Q. State to the jury whether or not you experienced any pain or suffering while you were there at this hospital at Glasgow, and if so, what it was.

A. I certainly did; I was in pain—well, had very severe pain in my head, my shoulders and my neck and my arms. I didn't have much—I didn't feel any in my lower extremities; they didn't seem to bother me any, but especially my head gave me lots of trouble. I couldn't move without pain.

Q. Do you know whether or not you had any black and blue marks on you, or did you observe that?

A. No, I couldn't look around over my body very much. They told me that there was some place on the head that was cut, but I couldn't see that, or couldn't say anything like what it was like.

Q. Now, from the hospital there at Glasgow where were you taken?

A. Taken to the train and from there brought to Portland, Good Samaritan Hospital.

Q. Do you recall or remember whether or not Dr. McDaniel, Dr. E. D. McDaniel, met you at the train, or do you recall that? A. He did.

(Testimony of W. G. Shellenbarger.)

Q. Do you know how he came to be there, as to whether arrangements had been made for that or not? [110—70]

A. Mr. Cheney, who was bringing me back, told me that he had wired ahead for Dr. McDaniel, to meet me with an ambulance at the train.

Q. Dr. McDaniel was there and helped you to get to the hospital? How long were you confined to the hospital? A. About six or seven weeks.

Q. And did you incur any hospital expense there? A. I did.

Q. How much was the bill there at the hospital?

A. Was about seven hundred dollars.

Q. Has that bill been paid by you?

A. Yes, sir.

Q. I beg pardon.

A. Yes, sir, I say the bill was taken care of, by—

Mr. ROCKWOOD.—It is immaterial, I think, how; the fact is he paid it.

COURT.—It has been paid.

Q. Now then, let me ask you this: Do you know whether or not any X-ray pictures were taken of you at this hospital at Glasgow, Montana.

A. Not during my consciousness.

Q. As far as you know, no pictures were ever taken of you?

A. I don't think they had any facilities; I think they told me that.

Q. Who was the physician that waited on you there; do you remember his name?

A. I think that I would know it if I heard it, but I can't recall it now.

(Testimony of W. G. Shellenbarger.)

Q. After you came to the hospital here, the Good Samaritan, do you know whether or not any X-ray pictures were taken of you? [111—71]

A. They were.

Q. Who were they taken by, and under whose direction?

A. I think under the direction of Dr. McDaniel. As I understand it, by the hospital facilities there.

Q. Now then, during your stay at the Good Samaritan Hospital there, did you experience any pain? Or suffering? A. Yes, I did.

Q. And of what nature was that?

A. Why the same trouble as troubled me in the hospital in Montana, pain in my head and neck and shoulders. I had to lie entirely on my back; couldn't lie on my side.

Q. Do you know how long you were confined to bed at the Good Samaritan?

A. I think about a month.

Q. And after that, do you know whether you were placed in a wheel-chair, or not?

A. Yes, the nurses used to put me in a wheel-chair and put me out, if the weather was nice; outside. First, just around the hall, and later if the weather was nice outside in the open air.

Q. What was your condition of health prior to receiving these injuries, as to your being nervous or otherwise? A. What was that question?

Q. What was your condition of health prior to receiving these injuries, as far as your nervous system was concerned—your nervousness?

(Testimony of W. G. Shellenbarger.)

A. I never was nervous before.

Q. Did you have any difficulty bearing or doing your work before this? A. No. [112—72]

Q. When did you finally go back to work at the station? A. I think it was about April 1st, 1929.

Q. April 1st, 1929?

A. About that time. I couldn't say definitely.

Q. From July 31st, 1928, then, until the first of April, 1929, did you do any work, earn any wages?

A. What was that?

Q. From July 13th, 1928, to April 1st, 1929, did you work at anything and earn any wages?

A. No.

Q. What were you receiving as wages from the government at the time you were injured?

A. Twenty-six hundred dollars a year .

Q. Is that paid out in monthly payments or is it paid in annual payment?

A. No, semi-monthly.

Q. Twenty-six hundred dollars for twelve months? A. Yes, sir.

Q. And then you lost in wages at that rate whatever that figures up to? A. Yes, sir.

Q. July 13, 1928 to July 1, 1929—or April 1st, I should say, 1929. Now since you have returned there to the station, since April 1st, 1929, how have you been able to perform your work and duties there? Tell the jury what your condition is now with respect to the doing of your work.

A. Well, I talked the thing over with the postmaster, and I told him—

(Testimony of W. G. Shellenbarger.)

Q. You wouldn't have a right to say the conversation; you couldn't be allowed to tell that. Let me ask you this [113—73] question: Do you have any difficulty or inconvenience in doing this work now? A. Yes, sir.

Q. Just tell the jury what the trouble is, if there is any? What is the difference between your situation now and what it was before you met with this accident?

A. It is pretty hard for me to tell the difference between now, and what it was before, but I can't think of things; I can't recall; I can't—if I undertake to read anything, any instructions, I have to read it over three or four times, and then I don't seem to be able to comprehend it, and I can't remember it. I am called—lots of times, I have to go to the phone and wait on the phone, answer the phone, and people want information. I have got to give them—supposed to give them that information; I can't; lots of times without it is something very simple and no change, why I can't give it to them. Have to ask some of the other clerks for rates or such things as that. It seems that I can remember things as they were, but things that have changed, I don't seem to be able to make those changes. Anything that was like it was before this accident happened I seem to be able to comprehend that pretty well, but I can't—where things have changed, I am at sea. It is pretty hard to make anyone understand that condition without they have gone through it or studied it some, and know what the actual conditions are.

(Testimony of W. G. Shellenbarger.)

Q. You spoke about your neck and back there, pointing up to the base of your head there; what was the trouble you experienced there?

A. Well, just a pain at the back of my head, that is where [114—74] my head joins. If I turned my head any at all, I would have pain. Of course now I have got so I can turn my head but I can't rest it. When I lie down at night I always have to prop my face to keep it steady so I won't lie over on one side and cause a strain on that joint, I guess it is.

Q. Do you suffer any from any pain at this time?

A. Oh, yes.

Q. What is the nature of that?

A. Well, I have—I don't know; I don't call it a headache. I call it a hurt; it seems to me more like a hurt than a pain in my head, the back part of my head, and I have practically headaches all the time too; in addition to that I have this extra pain or hurt that comes at the top of my head where it is fractured there.

Q. And how do you seem to get along, Mr. Shellenbarger—are you getting any better, or how do you feel?

A. Well, I don't like to say that I ain't getting any better but I ain't improving like I should. I know that I shouldn't be doing any work at all; that is the way I feel; that is the way my—anything that takes responsibility on me, I shouldn't take it. I have to ask the clerks that are there associated with me; I call on them lots of times for help and assistance to do my work that I ain't able to do,

(Testimony of W. G. Shellenbarger.)

and they have been very good and helped me out if I get in tight places or difficulties that I can't straighten out myself.

Q. It is mentioned here in the complaint that your hearing has been impaired; have you noticed any change in that respect?

A. Yes, I have. I have difficulty in hearing, especially if there is some other noise. Now a noise outside seems to break in on anything that anybody is saying. I don't seem [115—75] to be able to get two things at the same time.

Q. Have you experienced any difficulty with respect to walking, or about your gait,—is it different from what it was before?

A. Oh, yes, I ain't able to get around near as readily as I used to; was always active, have been all my life, but I can't be active now. I have to be careful where I go, and how I go.

Q. What effect, if any, have these injuries had upon your stepping up? Suppose you are walking along the street down here and want to step up on to the curb or step up here on this witness-stand?

A. Generally when I am thinking about what I am doing, I generally figure that I have to have about two inches more than I ordinarily have to clear. If I go to step on the curb, I will try to step about two inches higher than I would ordinarily; that is about the only way I can express it. Lots of times my mind ain't on just what I am doing and where I am going and I will strike and stumble down.

(Testimony of W. G. Shellenbarger.)

Q. Did you have anything like that before this occurrence? A. No.

Q. Now, mention is made here of your eye-glasses. Did you have your glasses on at the time the accident occurred? A. Yes.

Q. And were they damaged or broken in any way?

A. The surface, the face of them was scratched.

Q. Did you spend any money for repairing them?

A. Yes, sir.

Q. How much did you spend for that, do you remember? A. I think it was thirty dollars. [116—76]

Q. And since you have come from the hospital, the Good Samaritan Hospital, have you had any medical attention? Are you receiving any now?

A. Yes, sir.

Q. And who has been waiting upon you?

A. What is that?

Q. Who has been attending you? Who has been waiting upon you?

A. I have gone to Dr. McDaniel. Went to him perhaps once a week for quite a while after I got out of the hospital, and I have also been to Dr. McCorkle.

Q. Dr. M. G. McCorkle? A. Yes, sir.

Q. And you have been receiving treatment from him, have you? A. Yes, sir.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Do you remember, Mr. Shellenbarger, what berth you had in the car?

(Testimony of *W. G. Shellenbarger.*)

A. I don't remember the number; I think it was about—it was close to the end, possibly the end.

Q. One of the lower numbered berths?

A. Yes. Well, I don't know whether it was one or eight, but it was a lower berth, and I think at the end of the car.

Q. Now, just what is the last thing you remember before you came to in the hospital at Glasgow?

A. Well, the last thing I remember I seemed to be falling through the air.

Q. Do you remember when you were in this act of falling that you refer to, did you see any man around you or close to you? A. No.

Q. So you don't know whether there was a brakeman in the [117—77] vestibule at the time or not?

A. Well, if there was any in there, I didn't know; I didn't see him.

Q. When you went forward do you know whether or not you threw your hands up?

A. Well, I imagine I would naturally—

Q. I am not asking what you naturally did, but do you remember?

A. No, I don't remember.

Q. When this lurch that you describe occurred you were walking straight forward towards the front end of the train; is that correct?

A. Yes, sir.

Q. Now was that a lurch which the sudden stopping of the train would make, do you remember?

A. Well, I couldn't say that; that is my impression, that it would be a sudden stop of the train.

(Testimony of W. G. Shellenbarger.)

Ot might have been—I think the speed was changed, —that is, I have got that impression some way, the speed was changed, and it would indicate to me that it was a stoppage, movement to stop the train.

Q. Now you say you were unconscious for a while over in the Glasgow hospital; you had apparently been there too for some time before you came to, and then you said on direct examination, I think, that you didn't feel yourself until the next day, after the night had passed; now, does that mean the day immediately following the accident, which would be the 14th, or do you mean the day after that, the 15th, after you had had a full night's sleep in the hospital?

A. The 15th; Sunday, I think it was.

Q. And on the 15th, you then felt yourself; you felt more nearly [118—78] normal; you were conscious?

A. Well, I was conscious, yes. From that time on I remember things that—that is I could—I knew what people were doing.

Q. You knew what people were doing, and you were capable then of talking to people?

A. Yes, sir.

Q. And in your talk you were capable then of making an intelligent statement; you were out of your unconsciousness? A. Yes.

Q. Do you know a gentlemen here in Portland by the name of Mr. Grutze? A. Yes, sir.

Q. Mr. Grutze of the Title & Trust Company?

A. Yes, sir.

(Testimony of W. G. Shellenbarger.)

Q. Were you ever in my office accompanied by Mr. Grutze? A. Yes.

Q. Do you remember when that occurred?

A. No, I couldn't tell the date.

Q. But it was the latter part of May or early in June of the year 1930, some few weeks before this action was actually started; that is correct, is it?

A. Yes, along in the spring, I think, of the year some time.

Q. And at that time you described and talked about how this accident happened, didn't you?

A. Yes, sir.

Q. At that time did you state in words substantially as follows, in the presence of Mr. Grutze and myself, that you had no recollection of how the accident happened, and that the last you knew was while you were inside of a car until you came to in Glasgow? [119—79]

A. I don't remember making any statement of that kind.

Q. Well, if that statement was—if you did make that statement was that a correct statement of fact at that time?

A. That would be a general statement, yes.

Q. Now you were examined, were you not, by Dr. Pease at the request of the defendant. That examination took place ten days ago here in Portland? A. Yes, sir.

Q. And at that time did you say to Dr. Pease substantially: "I was in a car aisle, and the next thing I knew I was in a hospital at Glasgow."

(Testimony of W. G. Shellenbarger.)

A. I don't remember saying anything of that kind. I may have said that.

Q. If you said that was that a correct statement of fact?

A. Well, partly; it might be partly. It wasn't a false statement but might not explain things fully.

Q. Well, wherein was that incorrect? "I was in a car aisle, and the next thing I knew I was in a hospital at Glasgow."

A. Well, I perhaps didn't state what had happened there in the aisle.

Q. Mr. Shellenbarger, I take it that you have admitted that you made a statement in the presence of Mr. Grutze and myself last spring substantially as I quoted it, that you remembered nothing from the time you were in the car until you came to in Glasgow, Montana. Did you say that?

A. I don't know that I got your question. That don't cover all the time.

Q. I am trying to find out whether that statement you made in May or June of 1930, in my office was a correct statement of fact; were you telling the truth then? [120—80]

A. Well, I certainly told the truth; I never told anything else.

Q. I assume that, of course; and when you were talking to Dr. Pease here, ten days ago, and when you said, of you did say it, "I was in a car aisle, and the next thing I knew I came to in a hospital at Glasgow"—if you said that it was your intention to tell the truth at that time too, was it not?

(Testimony of W. G. Shellenbarger.)

A. Yes.

Q. On the 15th of July, 1928, that is two days after the accident happened, or approximately two days after the accident happened, you were still in bed, were you not? A. Yes.

Q. I show you a statement or written sheet dated Glasgow, Montana, July 15, 1928, and at the bottom written in "W. G. Shellenbarger." Did you sign that?

Mr. DIBBLE.—Just a moment, let me look at that.

Mr. ROCKWOOD.—I am not asking for the contents. I just want to identify his signature.

A. I don't know anything about it.

Q. Well, look at it, is that your signature?

A. Well, I couldn't say that it was; I wouldn't say that it wasn't.

Q. You don't know whether that is your signature or not? A. No, I couldn't.

Q. Do you remember being called on by some representative of the Great Northern Railway Company, who asked you as to the facts at that time?

A. No.

Q. You say that you had your glasses on at the time of the accident. How do you remember that?

[121—81]

A. Well, I always wear my glasses. I never go without them.

Q. That is the only way that you are sure that you had your glasses on at that time—that you usually wore them? You have no recollection of

(Testimony of W. G. Shellenbarger.)

actually whether you had your glasses on or not, have you?

A. No, I have no recollection.

Q. For what difficulty in your eyes do you wear glasses?

A. Well, I can't see to read without the glasses, that is, I can't see good; I can read large print, and used to wear glasses, nose glasses; I found so much difficulty in them sliding and getting misplaced and the vision wrong, that I got a different style of glass and put them on, and wear them all the time.

Q. Is that near sightedness, or far sightedness, do you know? A. No, just old age, I guess.

Q. What is the effect of old age? You are not so very old at that. What is the effect of old age,—near sightedness, or far sightedness, do you know?

A. No.

Q. How long have you worn glasses regularly?

A. About ten years, twelve years, something like that.

Q. And during that period your vision has been such that you wear glasses constantly?

A. Yes, sir.

Q. For reading and for all your other activities, while you are walking on the street, and everything?

A. I have bifocal glasses for that reason, so I can see at a distance, and at the same time use them for reading.

Q. You said on direct examination that before you came to the vestibule you noticed the swaying of the car as usual. Now, then, [122—82] will you tell us what the nature of that swaying was?

(Testimony of W. G. Shellenbarger.)

Was it a rocking of the train from side to side, or was it a jerking of the train by the change of speed?

A. No, it seemed to be a movement from side to side. I don't know that I stated more than usual. It was just about the usual movement of the train that you find. I noticed that.

Q. How were the lights that were in the vestibule, the lights in the ceiling?

A. I couldn't say about that.

Q. Then when you remarked a minute ago that there were, you couldn't recall to be sure?

A. No, I—

Q. On your direct examination you said there were the ordinary lights up above, but now you say you don't know whether there were or not?

A. I don't think I said that. I didn't understand it that way,

Q. The record will show what you said. But if you did say it—

COURT.—I think, if I recall, counsel assumed it in a question.

Q. Is that it? Maybe I am mistaken. The fact is, Mr. Shellenbarger, that you don't know whether the lights were burning in the vestibule or not?

A. I couldn't tell you, no.

Q. At any time immediately prior to the accident, or within a few minutes of the accident, were you talking to Mr. and Mrs. Meyer of Salem?

A. Yes, sir.

Q. In what car were they?

A. Well, I couldn't say; they were perhaps either one or two cars ahead of the observation; might

(Testimony of W. G. Shellenbarger.)

have been in the next [123—83] car, I couldn't say about that.

Q. Well, how long before the accident did that happen?

A. Well, that was perhaps half an hour.

Q. Within two or three minutes, or four or five minutes of the accident, you say you were not talking to Mr. and Mrs. Meyer? A. How is that?

Q. You had not talked to Mr. and Mrs. Meyer within three or four minutes of the time of the accident?

A. No, I had been talking to them, and went from their car on through to the observation-car, and after I had been in the observation-car some twenty minutes to half an hour, I was returning, to go to bed; and I talked to them on my way up.

Q. You talked to them on the way up?

A. On the way going to the observation-car.

Q. On your way back, before you started on the trip forward? A. Yes.

Q. As a matter of fact, Mr. Shellenbarger, whatever your condition has been since you went back to work about April, 1929, you have worked continuously at your former occupation, superintendent of the station? A. Yes, sir.

Q. And during this period, after your return to work, I assume that you have attended your Fraternal meetings with some regularity?

A. I have gone up occasionally; I don't go like I used to, of course.

(Testimony of W. G. Shellenbarger.)

Redirect Examination.

(Questions by Mr. DIBBLE.)

Just one or two questions, Mr. Shellenbarger. I omitted to ask you whether or not you have had any [124—84] dizzy spells of any kind since the happening of this accident? A. Yes, sir.

Q. What trouble have you had along that line?

A. Well, I have dizzy spells occasionally now; I notice more when I am lying down, kind of wavy dizzy spells; lot of times I feel it when I am walking. I am able to keep from falling down; I never have fallen down from them; but I notice that kind of whirling feeling.

Q. State whether or not there was any injury to your shoulder. I don't know whether I asked you concerning your shoulder or not. A. Yes.

Q. Which shoulder was injured?

A. My shoulder was injured.

Q. Which one was that?

A. I noticed pain on my shoulder, not very sharp pains, but I was lying mostly on my back, and after I got well enough to try and turn over, I couldn't lie on that side, and after—the next time I went to call on Dr. McDaniel I spoke to him about it, and asked him if he thought there could be any danger of any injury there. He says, "I don't think so," but he says, "You come up and I will make an X-ray and see." So some time after that I went up, and he had some X-rays taken, showing.

Q. Mr. Shellenbarger, counsel asked you about some conversation he says took place between you

(Testimony of W. G. Shellenbarger.)

and him and a Mr. Grutze. Where was that talk that you had with them? At whose office was that?

A. Dr. Rockwood's office.

Mr. ROCKWOOD.—Not doctor.

Mr. DIBBLE.—He is a doctor of laws. [125—85]

Mr. ROCKWOOD.—No, hardly that.

Q. Down in Mr. Rockwood's office, down at Carey & Kerr's, wasn't it? A. Yes.

Q. Railroad office, in the Yeon Building?

A. Yes.

Q. Did you have anybody there representing you as a lawyer? A. No.

Q. You were there with Mr. Grutze, and had some conversation with Mr. Rockwood here?

A. I went up there with Mr. Grutze; he is a friend of mine.

Q. And that statement he is asking concerning, if I understand your testimony correctly, you did make that statement to Mr. Rockwood, but that was not a full statement of the whole thing, as I understand?

Mr. ROCKWOOD.—I object to that as a leading question.

Mr. DIBBLE.—Strike that out.

Q. That part that he mentioned there, that you were thrown from the train, and woke up in Glasgow, you may have said that, and that is true, is it?

A. Well, yes. That is a general statement.

Q. Were you undertaking at that time to give all the details of what happened to you?

(Testimony of W. G. Shellenbarger.)

A. No.

Q. Were they trying to find out the details of it?

A. No, I don't think so.

Q. To pin you down? A. No.

Q. And this Dr. Pease you speak of; you were examined by Dr. Pease, you say. He was employed by the railroad company, [126—86] wasn't he, to examine you? A. Yes, sir.

Q. For the purpose of testifying in this case?

A. Yes, sir.

Q. And now they said you made some statement to Dr. Pease there, that you were thrown from the train and woke up in the hospital.

Mr. ROCKWOOD.—That isn't the statement there, of course.

Mr. DIBBLE.—What was it? So I get it right.

Mr. ROCKWOOD.—The last he remembers, he was walking in a car aisle. The next he remembers, he was in a hospital as Glasgow.

Q. If you told that to Dr. Pease, that was true, wasn't it?

A. Yes, when I went before Dr. Pease I went to the doctor thinking he was going to make a physical examination, and—

Q. Did you have your doctor—was I up there, or any of your counsel up there with you at that time of the examination, any attorney with you?

A. No.

Q. You understood you were to be examined by him, to find out your physical condition?

A. Just simply made the general statement about

(Testimony of W. G. Shellenbarger.)

other things, but I gave him facts about my physical condition.

Q. Dr. Pease was not trying to pin you down there, and be a lawyer, in the case, was he?

A. No.

Q. And getting the details of this thing?

A. No, sir.

Q. Just wanted to know generally what experience you had been through. Is that the way it was? A. That is right. [127—87]

Q. They have spoken about your glasses here. What was your habit of wearing glasses, when you were walking, for instance?

A. I always wore them.

Q. And when you say you wear glasses all the time, that means you always have them on when you are walking around? A. Yes.

Q. Or might you take them off when sitting down in a room, or something like that?

A. I never take them off.

Q. Always have your glasses on?

A. Wear them all the time.

Q. When walking—in walking through the car, would you have your glasses on? A. Sure.

Mr. ROCKWOOD.—I object to that; that is not competent.

Q. Was there any reason at that time why you should act any different on this occasion than you were in the habit of doing? A. No, sir.

Q. Was there any reason why you should not be wearing your glasses? A. No, sir.

(Testimony of W. G. Shellenbarger.)

Q. This writing that counsel exhibited to you there, and afterwards showed to me, on that sheet of paper there, written in ink, that upper part he never asked you about that; that upper part, that whole long page, that is not your handwriting, it is?

A. No.

Q. You never wrote anything on there?

A. I don't remember ever seeing that before. I don't remember of ever—anything of that kind ever being presented to me. [128—88]

Q. But you can't remember one way or the other whether you signed that paper he showed you, or not?

A. It might be that I did sign it. I couldn't say. But I don't have any recollection of it.

Q. But all the writing in the body of it, that is somebody else's writing? A. Yes, sir.

Q. Do you have any recollection of being taken into this hospital? Mr. Cheney says you were unconscious; that they picked you up on the right of way and put you in a conveyance? A. No.

Q. Were you conscious of being carried along by that means to this hospital? A. No.

Recross-examination.

(Questions by Mr. ROCKWOOD.)

I don't want any misunderstanding, Mr. Shellenbarger, about the conference with Mr. Grutze. When you came up Mr. Grutze was your friend and brought you up there to me, members of our office, who he told you represented the Great Northern Railway Company. Is that correct?

(Testimony of W. G. Shellenbarger.)

A. Yes, sir.

Q. And at that time you told us that you had no lawyer hired. Isn't that true? A. Yes, sir.

Q. And you came up to see whether—well, just talk over the case with the representatives of the Great Northern, and Mr. Grutze, as far as he represented anybody, was your representative?

A. No, he wasn't; he wasn't my representative at all. He just simply went there to be there. He said he knew you, had come [129—89] in contact with you, and I had talked to him about my condition. He said that he would go up with me to talk it over and see whether—what I wanted to do. So I felt, and my object in coming to you, was to have some satisfaction in this, and not have to go through what I had to-day.

Q. But we couldn't get together. That is all.

Witness excused. [130—90]

TESTIMONY OF DR. E. B. McDANIELS, FOR PLAINTIFF.

Dr. E. B. McDANIEL, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Dr. McDaniel, you are a practicing physician and surgeon? A. Yes, sir.

Mr. ROCKWOOD.—I admit the Doctor's qualifications.

(Testimony of Dr. E. B. McDaniel.)

Q. Your office is where, Doctor?

A. In the Pittock Block.

Q. And has been for a number of years?

A. Yes.

Q. You have a brother also who is a physician and surgeon? A. Yes, sir.

Q. And your name is Dr. E. B. McDaniel?

A. Yes, sir.

Q. Bruce, E. B., and your brother's name is Roy?

A. Yes, sir.

Q. Does Roy McDaniel hold any position—is he employed in any way by the Great Northern?

A. Yes, sir.

Q. State whether or not your brother is Chief Surgeon in Portland for the Great Northern.

A. No, I don't think he is classed as Chief Surgeon.

Q. About how long has he been surgeon for the company? A. That I can't answer.

Q. But he is still surgeon, is he?

A. Yes, sir. [131—91]

Q. And has he been surgeon for the company for a number of years? A. Several years.

Q. And you belong to the—do you belong to the Knights Templars? A. I do.

Q. State whether or not it was because of that—if it is a fact—

Mr. ROCKWOOD.—Just a minute. I think that is immaterial.

Mr. DIBBLE.—I just want to show how he come to meet the train.

(Testimony of Dr. E. B. McDaniel.)

Mr. ROCKWOOD.—The question is, who called him?

Mr. DIBBLE.—Yes, that is the way to get at it.

Q. How did you come to meet the train, to meet Mr. Shellenbarger?

A. I think a wire from Glasgow, from Joe Freck.

Q. Do you recall who wired you from there?

A. I think Joe Freck. I won't say positive. But some of the boys at Glasgow sent me a wire.

Q. And the purport was that you should meet the train there and take—

A. Take care of Mr. Shellenbarger.

Q. Take care of Mr. Shellenbarger, which you did? A. Yes, sir.

Q. And then you took him where, Doctor?

A. To the Good Samaritan Hospital.

Q. State whether or not you treated him all the time he was at the Good Samaritan Hospital?

A. I did.

Q. Do you recall—would you know offhand how long he was there; he says six weeks.

A. I think he went in on the 26th of July. I should say there [132—92] six weeks; I don't remember the exact dates now.

Q. Did you take any pictures of him there?

A. I did—had them taken.

Q. Do you know whether or not any X-ray pictures were taken of Mr. Shellenbarger before he was sent to Portland?

A. I don't think so; I didn't understand there had been.

(Testimony of Dr. E. B. McDaniel.)

Q. As far as you know, were no X-ray pictures taken at Glasgow, Montana?

A. I don't think there were; as far as I know, there were not.

Q. Did you bring with you, Doctor, the pictures that were taken at the Good Samaritan Hospital?

A. Yes, sir.

Q. Would you just take them out, please? Have you any memorandum on there, Doctor, that would show when the picture was taken?

A. Yes, I think there is.

Q. Just state when the X-ray pictures were taken.

A. The ones taken at the Good Samaritan Hospital were taken July 27, 1928.

Q. Would you take one of those, Doctor, and say what it is? How many pictures in all did you take, Doctor?

A. I don't know how many are here. These are two taken at the Good Samaritan Hospital; these are just head pictures. I think four were taken, four or five.

(Two films offered in evidence and marked Plaintiff's Exhibits 1 and 2.)

A. Now, this is a picture of Mr. Shellenbarger's head, taken in the Good Samaritan Hospital, on July 27, 1928, two days after he came in, showing a side view of the head.

JUROR.—We can't see through you. [133—93]

A. I was just looking to find that crack, so I could get out of way. I don't know whether you

(Testimony of Dr. E. B. McDaniel.)

can see from that distance. Right along here see a little black irregular line that runs this way. That is where the medial fracture of the skull was. These other dark lines here are suture lines; not the one that comes along, but over above the hard line, comes along here, about two and a half inches long, right below that mark.

Q. State whether or not, Doctor, that picture—state whether or not that photograph, Plaintiff's Exhibit 2, shows a fracture of the skull?

A. Yes, it does.

Q. And that is called what kind of a fracture?

A. Linear, just split, without bone displacement.

Q. State whether or not such a fracture could be caused by a person falling and striking on his head?

A. Yes, sir.

Q. If a man was thrown from a train and struck on a right of way, would it be likely to cause an injury of that character? A. It could.

Q. Aside from the fracture of the skull, would there not be concussion?

A. Yes, there would.

Q. Now, referring to Plaintiff's Exhibit 1.

A. That is another posterior picture, taken from forward back through to the back of the head. This does not show the fracture; nothing on that to show.

Q. That is taken just as you look towards the frontal bone? A. Yes, sir.

Q. Have you some other pictures? Have you any pictures of [134—94] the shoulder?

(Testimony of Dr. E. B. McDaniel.)

A. This is a picture of the right shoulder of Mr. Shellenbarger taken in December, 1928, after he got out of the hospital; he still was complaining of his shoulder; and right on the point of this bone here, below the scapula or the shoulder blade, is a small chipped out fracture, practically healed up there.

Q. State whether or not that could be produced by falling? A. Yes, sir.

Q. From a train, striking—

A. Yes. Now this is a fourth, taken in February, 1929, of the same shoulder, showing how this piece has healed in here. These other X-rays here are pictures taken later on, of the head, and do not show fracture.

Q. Does it show any callus?

A. No, didn't show callus in that; they are practically negative pictures.

Q. They are practically negative? A. Yes.

Q. Would they be of any assistance to the jury?

A. I don't think so at all.

Q. Doctor, aside from the fracture of the skull which you have described here, what other injury could there be following a fall from the train?

A. Well, in his case, he had more or less concussion; he had this fractured shoulder blade, and general bruises that come from an injury of that kind.

Q. And what effect does the concussion of the brain have upon the person receiving it? What symptoms flow from that?

(Testimony of Dr. E. B. McDaniel.)

A. We might have a general condition of unconsciousness if the concussion was severe.

Q. And what effect does concussion have? For instance, would [135—95] it cause headaches, would it cause a man to have headaches?

A. Would temporarily; yes.

Q. And how extensive would the headache be? Would that be commensurate, depending upon how severe the concussion was?

A. Absolutely. I considered, when Mr. Shellenbarger reached Portland, that the concussion was over; that he had this fractured bone, and the after effect of that.

Q. Did he seem to suffer any pain, or suffering?

A. Yes, he did.

Q. Did he make any complaint of that sort?

A. Yes.

Q. What did he complain of, Doctor?

A. Pain in his head, pain in his shoulder, general soreness.

Q. From the examination you made of him, what you knew of his condition, would that naturally follow from his injury? A. It would.

Q. Is there anything else that you noticed wrong with him, except what you have mentioned?

A. Well, he had a lot of trouble. I don't remember all the details as they came up; he was a sick man there for quite a while; had all the things that come from a man being shot off that way, like trouble with his bowels, and things of that kind. I don't remember the details of it.

(Testimony of Dr. E. B. McDaniel.)

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Doctor, from your knowledge of the history of this case, is there any present effect that you know of that you can trace from this fractured skull?

A. A man can never tell exactly what the after effect of a skull fracture is; but this is one of the fractures that [136—96] you would not expect any after effect from.

Q. You would not expect any after effect?

A. You would not; you never can tell. But the kind of a fracture, similar to a linear crack, without depression, that is the kind you would not expect; what may happen, nobody can be sure.

Q. There was no compression on the brain as a result of this fracture?

A. Not after I saw him, at all; no evidence of it.

Q. Does the picture indicate that the fracture which was a linear fracture, is healed up?

A. The last picture, yes.

Q. These last pictures were taken in February, 1929?

A. I think that is the date; I don't remember exactly.

Q. That is, eight months after the accident the fracture was healed up?

A. It didn't show on the X-ray plate.

Q. When did you examine him last, Doctor?

A. I think it was in February, 1929.

Q. You haven't attended him since that?

(Testimony of Dr. E. B. McDaniel.)

A. I haven't.

Q. At that time what was your opinion as to his physical condition?

A. Well, he was improving gradually. I told him I thought the best thing he could do was to try to go to work again.

Q. It was your opinion at that time that he was able to go to work?

A. I thought he could go on with his work, thought it would do him good to get his mind occupied.

Q. This injury to the shoulder, is that completely healed as [137—97] far as you can see?

A. Oh, yes.

Q. There is no—as far as you know, there is no permanent injury as the result of that chip off the bone in the shoulder?

A. I don't see why there should be; it is below the joint or shoulder-blade; I don't see why it should affect his shoulder any.

Q. There was no injury to the joint itself in connection with the fracture of the shoulder?

A. No.

Q. You have described it, I think, as a chipped out fracture. A. Yes.

Q. Just so we will be clear, which side of the head was the fracture on?

A. If I remember right, on the right side. These pictures here are not stamped, and I am not sure.

Q. Was no fracture at the top of the head?

A. No.

(Testimony of Dr. E. B. McDaniel.)

Q. Now, as a matter of fact, concussion of the brain shows itself in being knocked out and becoming unconscious. That is right, isn't it?

A. Generally.

Q. A prize-fighter that gets knocked down and is unconscious, he has concussion of the brain?

A. Yes, sir.

Q. And the same way, a football player, if he is knocked out temporarily, he has concussion of the brain? A. Yes, sir.

Q. Anybody that is knocked out and becomes unconscious from a bump on the head, has concussion of the brain. Is that right? [138—98]

A. Yes, always. Concussion is spoken of simply as a jar. Destruction of brain tissue—

Q. And the fact there is concussion does not indicate at all there will be any permanent effect from that? A. No, not necessarily.

Q. And I think you have already stated that you have no evidence that you know of, from which you could trace from this injury any permanence afterwards?

A. No, no objective symptoms. I am basing my observation on what Mr. Shellenbarger told me of his symptoms.

Q. And of course in the subjective symptoms you have to depend entirely on the patient?

A. Absolutely.

Redirect Examination.

(Questions by Mr. DIBBLE.)

Well, Doctor, did you hear Mr. Shellenbarger's

(Testimony of Dr. E. B. McDaniel.)

testimony? Were you in the courtroom when he testified?

A. I heard part of it, but I couldn't hear much of it.

Q. Did you hear his testimony concerning where he is working at this time, and his loss of memory, and things of that sort?

A. I could hear some of it there, yes.

Q. State whether or not those conditions would probably arise from an injury of the character he received here?

A. Nobody can tell about that.

Q. I see. Then they are called subjective symptoms, Doctor. But is it not a fact that that type of subjective symptoms accompanies this sort of injury? A. They might.

Q. Assuming a man were thrown from a moving train, and struck [139—99] on his skull sufficient to fracture it, produce the linear fracture described here, and suffered a concussion which rendered him unconscious, would not the severity be such as to still cause a man to be impaired physically?

A. I say it might do it. There is no evidence of brain injury after Mr. Shellenbarger came to me.

Q. That is as far as the pictures were concerned?

A. No, as far as the symptoms were concerned.

Q. But if he is truthful in saying he has headaches, if he does have them, could that be attributable to this?

A. I have no reason to doubt Mr. Shellenbarger's

(Testimony of Dr. E. B. McDaniel.)

statement of what he is going through. It is something nobody can prove, or disprove.

Q. But would present headaches be likely to follow an injury of this kind, or could it follow?

A. It could, yes.

Q. And the difficulty he speaks of in walking, stepping up, etc., or the difference in his gait, could that be caused by his injury?

A. Oh, any kind of symptoms might follow a head injury.

Q. Did you ever make any examination of him to see if he had what we call Romberg?

A. Yes.

Q. What is the fact on that?

A. No symptom of nerve injury at the time I saw him in the hospital. I haven't seen him for months at all.

Q. You haven't seen him recently? A. No, sir.

Witness excused. [140—100]

TESTIMONY OF DR. M. G. McCORKLE, FOR PLAINTIFF.

Dr. M. G. McCORKLE, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Dr. McCorkle, you are a practicing physician and surgeon? A. Yes, sir.

(Testimony of Dr. M. G. McCorkle.)

Q. And you are regularly licensed to practice under the laws of the State of Oregon?

Mr. ROCKWOOD.—We admit his qualifications.

Q. He admits you are a good doctor, or at least qualified. Do you know Mr. Shellenbarger, the plaintiff in this case? A. Yes, sir.

Q. State whether or not you have acted as his physician in treating him for injuries following the accident involved in this case?

A. Since the 15th of October, 1928.

Q. And since that time state whether or not you have attended him, and how often, and what you have done.

A. Well, I have attended him quite often, and have accomplished some in my treatment.

Q. When he came to you in October, 1928, what evidence of injury was there at that time that you discovered, what did he complain of?

A. Well, he complained of pains in his head, dizziness, pain in his shoulder, and some in his back, and inability to use his limbs properly in walking, and of being dizzy walking [141—101] on the street, or trying to turn around.

COURT.—Speak a little louder, please.

Q. Did you know Mr.—how long have you known Mr. Shellenbarger? A. About twenty years.

Q. Did you ever have occasion to treat him as a physician before this accident? A. No.

Q. And do you know, aside from being his physician, what his general condition of his health was

(Testimony of Dr. M. G. McCorkle.)

as you saw him about Portland during the past twenty years?

A. Well, it apparently was very good, because he was very active all the time I came in contact with him.

Q. Well, following this accident, Doctor, since you have seen him, that is, as a physician, and otherwise, is there any change in his condition and in his appearance from what it was before the 13th of July, 1928? A. Yes, sir.

Q. In what respect is he different?

A. Well, he is apparently partially dazed and complains of pain and for a long time he was very sleepless.

Q. Now, Doctor, assuming that Mr. Shellenbarger, while riding on the train, was thrown through the air, through the vestibule of the train, and struck upon the right of way, where was soft mud, I believe; the ground was not as hard as it might have been, but he struck on this mud after being thrown from the train, and was rendered unconscious. State whether or not such an occurrence as that would be likely to cause a fracture of the skull? A. Yes, sir. [142—102]

Q. And did you see the fracture that was shown upon the plate, by Mr. McDaniel? A. No.

Q. You didn't see that. You were back further in the room. But state whether or not such an accident could produce a linear fracture, or fracture of the skull? A. It could, yes.

A. And aside from the fracture of the bones, what are the common results of a fall of that nature, so

(Testimony of Dr. M. G. McCorkle.)

the jury will understand what might happen to a man, in addition to having a bone broken?

A. Well, he might have hemorrhage, he might have following inflammation of the meninges covering the brain.

Q. And may there, or may there not be, severe concussion of the brain, without a fracture of the bone too?

A. Oh, yes, we have concussion without fracture of the bone.

Q. Would an injury like I have described, a man being thrown from a moving train this way, and striking sufficiently hard to fracture the skull, would that, or would it not be likely to cause concussion? A. Yes, sir.

Q. How severe concussion might it cause?

A. That I couldn't say.

Q. How lasting would that concussion be?

A. Well, concussion itself, unconsciousness, is of different durations.

Q. Would a fall of that nature, receiving that fracture and that concussion, would that cause a man receiving it to be dizzy afterwards, or have dizzy spells? [143—103] A. It could.

Q. Would that be an unusual or a reasonable happening?

A. Well, in his case I think it is true.

COURT.—What?

A. In his case I think it is true.

COURT.—*General* speaking, he is asking the question.

(Testimony of Dr. M. G. McCorkle.)

A. Oh, generally. Well, I have never had enough head injury cases to say whether it would be general or not. Some that I have had, have had it.

Q. And what has Mr. Shellenbarger complained of during the time you have treated him? What has been his complaint, his difficulty?

A. Well, weakness, inability to concentrate, locomotion, deafness, and pain.

Q. State whether or not those conditions that he complains of, would they, or would they not be likely to flow from an injury of the character that he received here. A. Yes.

Q. Would it be unusual in any way for him to experience that trouble?

A. I didn't get the question.

Q. Would it be unusual in any way for him to experience that sort of trouble? For example, take headache. He still complains of headache.

A. Well, it is due to the injury.

Q. Would it be possible, medically, or probable at all, that he would suffer from headaches now? Here it is two years after the accident occurred?

A. It is possible.

Q. And has he been complaining of headaches?
[144—104] A. Yes, sir.

Q. And has he been complaining of headaches?

A. Yes, sir.

Q. And what would cause a headache such as he has, or this pain he describes? What could produce that? What is the reason for it?

(Testimony of Dr. M. G. McCorkle.)

A. Well, I think it is due to the adhesions of the coverings of the brain, disturbance of the lower part of the brain, perhaps the anterior, posterior, pituitary glands.

Q. Did you make any examination of him for his nervous condition? A. Yes, sir.

Q. Just describe to the jury what examination you made, and the result of it.

A. Well, we tested out his reflexes, and his walking on a line; by shutting his eyes and trying to stand still.

Q. When he would close his eyes and stand with his heels together what happened?

A. He would wave.

Q. What does that indicate medically?

A. It indicates an injury to the brain somewhere.

Q. And would a condition of that kind be likely to follow a fall such as he received? A. Yes, sir.

COURT.—Likely to? You say likely to follow?

A. Yes, sir.

COURT.—That is probably follow, or may follow?

A. These symptoms have followed this injury.

Q. What do you consider his present condition? When was the last time you examined him?

A. This week. [145—105]

Q. How do you consider his case progressing? Is he getting any better, is he recovering?

A. He is better than he was when he came to me, yes; but his physical condition I think is very poor.

Q. State whether or not you consider his injury

(Testimony of Dr. M. G. McCorkle.)

temporary or permanent in its nature. Do you think he will ever get well?

A. Well, I fear he won't.

Q. What makes you feel that way?

A. Well, there hasn't been enough improvement since the accident.

Q. What would you say as to whether or not he has been permanently injured as a result of this accident?

A. Well, he will be partially permanently injured anyway.

Q. In what respect will his injury be permanent? What will always exist, in your judgment?

A. He will always have trouble with his head, no doubt.

Q. What effect does a blow of this kind have upon the memory or ability to concentrate or think, or do mental work?

A. Well, that I couldn't say; the mental condition is impaired somewhat, to what it was before.

Q. And this difficulty with his gait, his locomotion, will that be a permanent condition, that dragging of the leg? A. I think so.

Q. You think that will be permanent also?

A. Yes.

Q. Do you think he will get relief from these headaches he is bothered with, these pains in his head? A. I don't think so.

Q. And Doctor, during this time that you treated him, that covers since October, 1928, to the present time, what is his [146—106] indebtedness to you

(Testimony of Dr. M. G. McCorkle.)

for medical service? What does he owe you up to this time?

A. Something over seven hundred dollars.

Q. We allege in the complaint, I think, \$750.00, as being the doctor's bill. Have you been paid that money? A. No.

Q. State whether or not that is a reasonable charge for the services you have rendered?

A. I think so.

Q. Customary charge in this community for services of like kind and character? A. Yes, sir.

Q. And is there anything else I haven't covered? I am not a doctor, and I have some difficulty in examining physicians. Is there anything else that a jury should know concerning this man's condition, that I haven't developed here?

A. No, I don't think so.

Q. This fracture on the shoulder, shown by the picture, would that interfere in any way with the use of the arm?

A. Well, yes; he can't get his arm up as he can the other, and never sidewise, this way.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Doctor, what is your practice,—general surgery, or some specialty?

A. Well, I did general medicine for thirty-five years, and surgery.

Q. Medicine and surgery, but no particular specialty?

(Testimony of Dr. M. G. McCorkle.)

A. Well, I have done quite a lot of surgery in the last few years. [147—107]

Q. You say the fracture in the shoulder does interfere with the motion of the shoulder. Have you ever seen an X-ray of that shoulder?

A. No, nor I didn't see the fracture did, but the shoulder was immovable—much less than the other. It hasn't the motion the other has, due to bruising no doubt, of the muscles, or some nerves, and it has atrophied some. The right arm has atrophied some.

Q. That is not the result of the fracture, is it?

A. It is the result of injury to the shoulder.

Q. Coming down to the injury, is that limitation a result of the fracture of the shoulder?

A. I don't know that.

Q. You were asked what caused the present condition, as shown by these subjective symptoms, and I think you said it might be caused by adhesions on the covering of the brain. Now is that your positive opinion, or is that what might cause it? Are you able to say that is the positive cause?

A. I think it is the cause.

Q. I beg pardon?

A. I think it is the cause, as best I can—

Q. You think there are adhesions on the covering of the brain? A. Yes, sir.

Q. You didn't see this case until some time after he had gotten out of the hospital?

A. No, sir.

Q. So you are not able to say whether at the time he went into the hospital, and at the time he came

(Testimony of Dr. M. G. McCorkle.)

out of the Good Samaritan Hospital, there was any evidence of brain injury?

A. I didn't see him? I didn't get the question.
[148—108]

Q. You didn't attend Mr. Shellenbarger until some weeks after he had come from the hospital?

A. It was the 15th of October.

Q. I think he got out of the hospital after he was there about six weeks from the 28th of July; so you cannot say whether, at the time he left the hospital there was, or was not any evidence of brain injury?

A. I do not know.

Q. Now you say that when he shuts his eyes and stands with his feet together, he waves? What do you call that test? A. That is Romberg.

Q. Is that test a check on an injury to a particular nerve? A. Not particularly so.

Q. Now you say it is not? A. No.

Q. Now if he does waver it indicates some injury to some nerve?

A. Yes, sir, some to the brain; to the brain nerves, or upper end of the spinal cord.

Q. But you can't identify from that test, what nerve, if any, has been injured? A. No, I can't.

Q. You made some remark, Doctor, that you didn't handle many head cases. Does that mean you have just handled five, or five hundred? About how many have you handled? I just want to get some notion of your practice in brain injury work.

A. Well, I have did over twenty trepannings.

(Testimony of Dr. M. G. McCorkle.)

Q. Are you able to diagnose, Doctor, what particular nerve from the brain has been injured in Mr. Shellenbarger's case? A. No.

Q. Is there a particular nerve which controls the locomotion [149—109] of the legs?

A. Yes, we have sensory and motor nerves both.

Q. And that would be the motor nerve, would it, that would affect his legs to produce a shuffling gait, if there is such a thing in him? A. Yes.

Q. Are you able to diagnose and say positively there has been an injury in that motor nerve?

A. Well, there must have been for him to have this condition.

Q. Now, do the reflexes of the leg have anything to do with that motor nerve? A. Partly.

Q. What reflex in the leg is motivated or operated by this motor nerve?

A. Well, from the brain proper.

Q. I know. But this knee reflex, does that operate from some nerve?

A. Through the same system, yes.

Q. So if there is an injury to this motor nerve, affecting the locomotion, that should likewise affect this knee reflex. A. It does.

Q. You say it does? A. Yes.

Q. What is the nature of his reflex at the present time? A. Very much exaggerated.

Q. Were you present during the examination of Dr. Pease the other day? A. Yes, sir.

Q. So that Mr. Shellenbarger was taken care of, though his lawyer was not there? [150—110]

(Testimony of Dr. M. G. McCorkle.)

Mr. DIBBLE.—Upon the medical part, not upon how the accident happened. I don't know that he went up there to inquire about that, except generally.

Q. Now, what nerve in the head, Doctor, affects the memory?

A. Well, it is owing to what you mean—what kind of memory?

Q. Well, the kind of memory that he is troubled with not having. A. Partial aphasia.

Q. Now, is there any test to determine whether that nerve has been injured, other than a subjective test? A. Not that I know of.

Q. Now, the matter of dizziness and headaches, is there any way of determining what nerve has been injured, except by examination of the subjective symptoms? A. That is all.

Q. And when I say subjective symptoms, I mean the things that a man tells you, not what the doctor can find out for himself. That is correct, is it?

A. He presents symptoms there that indicates it. His own self is telling it.

Q. I didn't get the answer.

A. He presents symptoms that tell you that.

Q. Mere concussion of the brain, taken by itself, may not be serious at all. Isn't that correct?

A. May not mean practically anything.

Q. Anybody may be knocked out temporarily and have no permanent injury whatsoever because of it?

A. Possible; and then they may have permanent injury.

(Testimony of Dr. M. G. McCorkle.)

Q. I say, the mere concussion itself.

A. No—yes. [151—111]

Q. And does not mean necessarily permanent injury? A. No.

Q. Or permanent after effects? A. No.

Witness excused. [152—112]

TESTIMONY OF J. O. FRECK, FOR PLAINTIFF.

J. O. FRECK, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Freck, about how long have you lived here?

A. About twenty years.

Q. And you are engaged in what business?

A. Stationery and printing business, just across the street.

Q. Mrs. Freck, was that your wife that testified this afternoon?

A. I presume so; she was over—went out to come over here.

Q. Was she on the train at the time with you?

A. Yes, sir.

Q. What car were you riding in, Mr. Freck?

A. I was riding in the last car, the car next to the observation-car; the next to the last car on the train.

Q. And did you see the accident? A. No.

(Testimony of J. O. Freck.)

Q. What was the first notice you had that there had been an accident?

A. Well, we were—Mr. and Mrs. Cheney and Mrs. Freck and myself were sitting in the last compartment on the car, that is the end next to the vestibule of the observation-car, playing bridge, and the first notice that we had of any accident or anything, some one stuck their head in our door and hollered that one of the Sir Knights had fallen off the train.

Q. And after that occurred, state whether or not you got up and went to see what had happened?

A. Yes, sir. [153—113]

Mr. ROCKWOOD.—Please don't lead the witness; just ask what he did.

Q. What did you do after that announcement was made? A. What is that?

Q. What did you do after that announcement was made?

A. Mr. Cheney and I jumped up and rushed outside, out to the vestibule.

Q. State when that was with reference to the time that they said the Sir Knight had fallen off the train; how long after that announcement was made did you get off it?

A. I don't understand the question.

COURT.—How long after you were told someone had fallen off the train was it that you went to the vestibule?

A. Immediately.

(Testimony of J. O. Freck.)

Q. And state what condition the train was when you went back there, as to being in motion or not.

A. We didn't go back; we were right there at the vestibule. The door of our compartment was right at the door of the car and in other words, it was next to the platform of the train—of the vestibule of the train where the Sir Knight fell off the train.

Q. When you went back there state whether or not the train was in motion.

A. The train was in motion when we jumped out, yes. When this Sir Knight hollered in the drawing-room to us the train was in motion, yes.

Q. Had it stopped yet after the accident? Had it got to Saco? A. No, sir.

Q. What was the condition of the vestibule there at the rear end of the coach? [154—114]

Mr. ROCKWOOD.—I repeat the objection this is not competent; not shown the condition was the same as at the time of the accident.

COURT.—Have to come to that by a process of elimination, I suppose. Go ahead; you can answer.

A. What is the question, please.

Q. What was the condition of the vestibule when you went back there, as to being open or otherwise?

A. The door to the vestibule was standing open from where—we went out on the vestibule, and the vestibule door and trap was open when we got out there, Mr. Cheney and I.

COURT.—On which side of the train?

A. It was on the north side of the train, sir.

(Testimony of J. O. Freck.)

Q. Which side would that be, left or right, as you would come from the observation-car and be going towards the engine? A. On the left.

Q. And now then state whether or not you noticed anything unusual in the operation of the train immediately prior to the time that someone stuck their head in the door, as you say, and said that a Sir Knight had fallen off the train?

A. I don't know how to answer that.

Q. You understand my question?

A. No, I don't. Anything unusual might mean anything; I don't know what you mean by that.

Q. About the movement of the train, to be more specific. Was there any lurching of the train, any movement of the train?

A. Why, I think—the reason I say this, we were sitting there playing cards, and naturally when you sit quiet and play cards, and dealing, things kind of move around a little bit; I thought was kind of a soft movement of the [155—115] train; there was a lurch, if that is what you want me to say.

Q. I don't want you to say anything but what the facts were, but if there was a lurch, when was that lurch with respect to the time when somebody said a man had fallen from the train; was it before or afterwards?

A. Was a very heavy lurch just prior to this man—I don't remember who the man was, whether the brakeman himself or who, but anyhow a very heavy lurch of the train. I know it kind of upset our game some, and the ladies made some remarks;

(Testimony of J. O. Freck.)

they can probably testify themselves what they said; I don't just recall what they said, but anyhow it was violent enough to upset our enjoyment of the game of bridge we were playing.

Q. When did that take place with respect to the time that somebody put his head in the door and said a Sir Knight had fallen from the train?

A. It was shortly before; I don't know how long before. Not very long; just shortly before that.

Q. You spoke about some other lurch; did you speak about some other lurch later on?

A. Well, we noticed a rolling there; I thought probably they had reballasted their track, and was soft roadbed; had been raining very hard.

Mr. ROCKWOOD.—I object to this kind of testimony; not responsive. No allegation about any defect in the track.

Q. Mr. Freck, let me ask you one more question: Was this lurch of the train that you speak of, was that just the ordinary motion of the train or was it extraordinary?

A. No, this was something more than just the ordinary roll of the train. I don't know what caused it.

Q. You don't know what? A. No, sir. [156—116]

Q. Did you get off the train to go back to where Mr. Shellenbarger had fallen?

A. After we got to the depot, yes, Mr. Cheney and I did.

(Testimony of J. O. Freck.)

Q. You went back with a machine as I understand it? A. With a machine.

Q. That is with an automobile?

A. Yes, just one automobile. Mr. Cheney and I got out, and got a young fellow there with an old Ford, and we drove back to the place of the accident.

Q. How far back was it where Mr. Shellenbarger had fallen?

A. Well, I should say—about half a mile probably; not very—I don't think over a half a mile; might have been a mile.

Q. As far as you know was the train ever stopped from the time Mr. Shellenbarger fell off until it was stopped there at the siding or station of Saco?

A. Was stopped at the switch, to go into the switch to let the west-bound train go by.

Q. But didn't stop any before that after he fell that you know of? A. Not that I know of.

Q. You observed Mr. Shellenbarger's condition there. Was he conscious when you saw him?

A. He certainly wasn't. You mean when we picked him up?

Q. Yes.

A. I thought he was dead until we got him into the automobile.

Q. Any blood about his person anywhere?

A. Yes, sir.

Q. Where was he bleeding?

A. Around his head. [157—117]

(Testimony of J. O. Freck.)

Cross-examination.

(Questions by Mr. ROCKWOOD.)

You say just prior to the time this man stuck his head in the door and told you that a Sir Knight had fallen overboard, you say there was a lurch, and then you spoke of another lurch after that. Was the second lurch a more violent lurch?

A. No, my recollection is the first lurch was the worst one; that is my recollection of it. That is quite a while ago now.

Q. So you cannot say how long prior to the time that man put his head in the door that this lurch occurred?

A. No, I can't. I wouldn't attempt to say. It was shortly before, and I would not say just when, but was shortly before that.

Q. And of course, you don't know what happened in that vestibule from the time that Mr. Shellenbarger fell out through it until you got there?

A. No, sir.

Q. When you got there in the vestibule, was the vestibule dome light burning up above?

A. I don't recall that.

Q. You would not say that it was not burning?

A. I would not, no, sir.

Q. And Mr. Shellenbarger, when you found him, was from half a mile west of the depot at Saco?

A. Yes, I should say so. We drove back, and of course we were all very much excited, and Mr. Cheney and this young fellow driving, the three of

(Testimony of J. O. Freck.)

us in the car, were all watching for this lantern up in the dark; that is the only light there was back there, and between the road was a sort of a ditch [158—118] with water in it and a fence, and then was an embankment on the track, and I got over and helped get the wire over; Mr. Cheney got across there and helped Mr. Shellenbarger over in the automobile, got him in there and took him back to the train.

Q. When you started from the depot in the automobile, could you see back up the track and see the lantern flashing around down there where Mr. Shellenbarger was?

A. No, I don't think I did. We just knew the lantern back there some place, and that is what we headed for.

Q. You didn't actually get off the train, Mr. Freck, until the train was on the passing track up there at the depot, did you? A. I did not.

Q. How did you happen to attend as a witness in this case?

A. You subpoenaed me, I *think was* you; and Mr. Dibble sent somebody for me and told me to come over here.

Q. You were subpoenaed by the defendant?

A. Sir?

Q. You were subpoenaed by me? A. Yes, sir.

Witness excused. [159—119]

TESTIMONY OF DR. JOHN A. SAARI, FOR
PLAINTIFF.

Dr. JOHN A. SAARI, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Dr. Saari, you are a physician and surgeon, are you? A. Yes, sir.

Q. And are you licensed to practice under the laws of Oregon? A. Yes, sir..

Mr. ROCKWOOD.—I admit his qualifications.

Mr. DIBBLE.—I would like to develop a little further his qualifications.

Q. How long have you been practicing, Doctor?

A. In Portland about ten years.

COURT.—Counsel concedes his qualifications.

Q. I want to ask if I could, have you any specialty, of any sort, Doctor? A. Specialty?

COURT.—Yes.

A. In the army of course my work was bone and nerve work, for a little over two years.

COURT.—Have you specialized in that since the army?

A. Since the army, not particularly; practice general surgery and medicine.

Q. I wish you would state to the jury, Doctor, whether or not you made any examination of Mr. Shellenbarger. A. Yes, sir.

(Testimony of Dr. John A. Saari.)

Q. And for what purpose did you examine him?
[160—120]

A. Well, I was told to go about the physical examination for court testimony.

Q. You wanted to find out what his condition was, for the purpose of testifying in the case?

A. Testifying, yes.

Q. At whose request did you make the examination? A. Well, at his own request, as I knew.

Q. And your office is where, Doctor?

A. Selling Building.

Q. Are you associated with Dr. McCorkle?

A. Yes, sir.

Q. You occupy the same office with him?

A. Yes, sir.

Q. I wish you would go ahead in your own way and state what examination you made of Mr. Shellenbarger and what in your opinion his present condition is.

A. May I refer to my history—rather this memorandum?

COURT.—Counsel asked what examination you made, not what history.

Mr. ROCKWOOD.—If I may examine the history when you are through with it. That is all right; go ahead.

A. I was relying on this memorandum; patient comes in for examination, Mr. W. G. Shellenbarger; age, 63. I asked him what he complained of; abnormal mental functions; physically inactive, unsteady gait, and previously—it is customary when a

(Testimony of Dr. John A. Saari.)

patient comes to the office for examination to take a history; this is as important as the physical examination; therefore I went into the history of the onset. Prior to July 13, 1928, the patient was well physically and mentally.

COURT.—That is what he told you? [161—121]

A. That is what he told me.

COURT.—The jury understands that is what the plaintiff told the doctor.

A. This is what the patient tells me, the history. Then while a passenger on a train met with an accident as follows: Going through the observation-car to the sleeping-car.

COURT.—I don't believe, Doctor, we will have that. I don't believe I will let him testify to that. The details of how the accident happened; he can tell—he has already told how the accident happened.

A. I was just reviewing my whole history.

COURT.—That is the very question we are trying here in this case.

A. What do you want,—just the physical history?

COURT.—Yes, certainly.

A. The physical alone. The patient appears fairly well nourished and developed, not actually ill looking; not alert mentally; walks with a very unsteady gait; and this is what I noticed without removing his clothing, when he comes to notice, the first observation; on inspection and observing the gait more and having him walk—

(Testimony of Dr. John A. Saari.)

COURT.—Have you any recollection of this examination that you can testify to, without reading from notes?

A. I can testify, but it is more accurate.

COURT.—I know.

Q. I prefer to have you put it away.

COURT.—Yes, because it is your conclusion.

Q. I am perfectly willing to do that way; just go ahead Doctor, and state what examination you made, and what his [162—122] present condition is, in your opinion?

A. When the patient came into the door of my office, the first thing I always look for is a principle of inspection—in that way we determine—

COURT.—You are telling what you did with this man, or what you generally do?

A. Just telling what I did with this man.

COURT.—That is what we are concerned with only.

A. He is not actually ill. Was not afflicted with an acute ailment. The man is of a retiring and very reserved nature, and appeared unalert mentally, and I noticed that his gait was unsteady. And as I had him approach a seat I noticed he had to hold the desk to sit down; then I had him get up and walk across the room again, to observe his gait further, and suddenly turn, and he sort of wobbled. I said nothing to the patient about that, but continued with the examination. I had inspected his head, or his scalp, to see whether there was any injury or scars, or deformity, or tumor, or anything

(Testimony of Dr. John A. Saari.)

like that. Examined his eyes, to determine whether or not the reflexes were disturbed. Examined his throat, teeth, tonsils, nose and neck, from his chest down to his toes. I reached the conclusion of what we call postural kyphosis, there is a deformity of the back, due to posture. His heart sounds are normal, regular in tone; no abnormal findings of the lungs; abdominal findings are normal. On examination of the extremities, his right shoulder there is evidence of some disturbance of the right upper extremity. In testing him out for function, he has a limitation of what we call hyperextension, that is the raising of the arms way above the vertical; there is a limitation in the right [163—123] arm, compared with the left; and also a limitation of adduction, that is pulling the arms and placing it out from the shoulder. The measurement of the comparative arms—I will have to refer to that.

COURT.—Refer to that.

A. First, we find that the muscles of the right arm are more flabby compared with the left arm, and the measurements at the level of the biceps, the bicep muscle of both arms, the right arm measures ten inches in circumference, the left ten and five-eighths. The right forearm four inches below the elbow joint measures ten and three-eighths, and the left ten and a half inches. One-eighth inch difference there. There is also what we call an atrophy or shrinkage of the shoulder muscles on the right side.

Q. Now, Doctor, assuming that this man, Mr.

(Testimony of Dr. John A. Saari.)

Shellenbarger, was thrown from a steam train while it was in motion, and was thrown through the vestibule of the train and struck upon the soft ground of the right of way, state whether or not a fall of that kind could produce a fracture of his skull.

A. Yes, sir.

Q. In one of the exhibits we have here, one of the X-rays, there is shown what they call—I believe the doctor called, a linear fracture, which I think he said was upon the right side of the man's head. Could that kind of a fracture follow from this sort of an injury? A. Yes, sir.

Q. And would that be, likely, or unlikely to occur?

A. A fall is very likely to produce it, but it may not.

Q. But if a man did not have a fractured skull before, and was found to have one now by this picture, that would follow [164—124] from this accident? A. Yes, sir.

Q. And even though, Doctor, there were no breaking of the bones, would a fall of that kind have any effect on a person's brain, for instance, or other parts?

A. There may be intercranial injury with the fracture.

Q. What would be any evidence of that? What symptoms would a person complain of that had that sort of injury?

A. It might—of course would be no complaint as

(Testimony of Dr. John A. Saari.)

far as the patient was concerned, because he would be unconscious.

Q. I mean after the unconsciousness ceases, and the patient is able to go around. Would there be any effects from it?

A. The usual findings of headache, very severe headache, dizziness, sometimes nausea and vomiting.

Q. Take the matter of headaches, for instance. Mr. Shellenbarger complains of headaches, complains he still has headaches to this time. State whether or not from the fall, as I have described here, it would be possible for a man to have headaches at this time from that accident?

A. My opinion is it would be possible.

Q. Would it be unusual at all, or unlikely to happen?

A. Well, with ordinary intercranial concussion, which is really a misnomer, the immediate symptoms of headache disappear, that is, the constant headache, but there are recurrences that might be attributable.

Q. Take this gait you speak of, the difference or impairment in his gait. What is it that controls that? What nerve controls the gait of a person?

A. The motor system of the body controls the locomotion.

Q. Can an injury to the brain effect an injury to the legs? [165—125] A. Yes, sir.

Q. Affect the use of the legs? A. Yes, sir.

Q. And to what do you attribute his shuffling gait that you speak of? To what do you attribute that condition you say he had?

(Testimony of Dr. John A. Saari.)

A. It is possibly on account of the injury, because the history states that prior to the injury he was normal.

Q. This is a statement which is for a jury, of course, what he says; if that is true—if, prior to this accident, he was normal as far as walking is concerned, and has only had the diseases he has told the jury about, that is, whooping-cough and measles, and the breaking of his leg at one time—if that is true, and he now has this condition of his gait, to what would you attribute that present condition?

A. I would personally attribute it to the injury.

Q. Would that be contrary to medicine and surgery to come to that conclusion?

A. In my opinion it would not be contrary.

Q. Which side of the head, for instance, controls the leg?

A. Well, the right side of the head usually—the reflexes are on the opposite side; there is a crossing, what we call a cross-track.

Q. A blow on the left-hand side would affect the right leg? A. Yes, sir.

Q. What I am getting at is: Is it possible for there to be a severe blow upon the head, injuring the brain, in addition to a fracture, that might cause impairment in the use of a man's legs?

A. Yes, sir. [166—126]

Q. And what the present condition of his gait be attributed to if it isn't to this accident? Get at it that way,—with his history.

A. With his history I feel it is attributable to the

(Testimony of Dr. John A. Saari.)

injury; I removed,—in the examination, the laboratory examination, the possibility of constitutional diseases like syphilis. That gait and staggering, unsteadiness, can be produced by syphilis.

Q. Did you make any test for syphilis?

A. I made laboratory test of his blood, had a laboratory test, and the blood is normal, ruling out any possibility of constitutional diseases, which might produce the findings. He gives no history of alcoholism, which might produce a staggering gait.

Q. What is Romberg? There is testimony.

A. The Romberg test is applied to determine whether or not there is evidence of intercranial injury or disease.

Q. State whether or not you made a test of that kind. Did you make a Romberg test?

A. Yes, sir.

Q. State whether or not you made that test of Mr. Shellenbarger? A. Yes, sir.

Q. How was that test made, what did you do?

A. By having a patient stand with his arms to his side, feet together, and with the eyes closed. A normal person will stand erect without swaying; but where is evidence of injury within the brain, or within the skull cavity, injury or disease, we get a positive Romberg test, indicating there is what we call upper neuron lesion. [167—127]

Q. How did Mr. Shellenbarger respond to that test?

A. My interpretation of the test was that it was

(Testimony of Dr. John A. Saari.)

positive for Romberg, indicating intercranial injury.

Q. State whether or not he does sway when he stands there with his eyes closed and heels together.

A. Yes, he swayed.

Q. And that indicates nerve injury, injury to the nerves?

A. Not particularly to the nerves; to the brain itself.

Q. What is your opinion, Doctor, in view of the fact that this—

COURT.—Ask him what his opinion is as to its duration.

Q. What is your opinion as to the duration of this impairment of gait, for instance?

A. I don't think he will ever recover completely.

Q. And this impairment in raising his right arm, is that due to the shoulder injury?

A. That is a local injury.

Q. And might that get any better?

A. I feel he will get full use of that arm.

Q. But his gait is a permanent condition?

A. I feel that it is permanent.

Q. What about his pains in the head, and these dizzy spells and things of that kind?

A. Well, the severity of them could be modified, by colds or intestinal disturbances, or what not, but might recur, the severity. It is hard to estimate really the duration. I can't tell that.

Q. What would you say as to whether Mr. Shel-

(Testimony of Dr. John A. Saari.)

lenbarger has been permanently injured or not as a result of the injuries received in this accident?

A. My opinion he is permanently injured. [168—128]

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Dr. Saari, it is your opinion there is some permanent injury, but that of course will not incapacitate him from performing some gainful occupation, will it? A. Some gainful? Probably can.

Q. If his work is the work of an office man, he will be able to continue his capacity will he not?

A. Depending on his capacity and the amount of mental work required.

Q. The testimony is that he has worked continuously in the capacity of superintendent of postal station from April, 1929, something like that.

Mr. DIBBLE.—Just a moment; there is other testimony of course; that is hardly a fair statement of what the testimony is, because, while it is true the testimony is he has worked that length of time, there is also testimony which the doctor should have, as to the conditions under which he has been doing this work—lack of memory and things of that sort, which are proper for the doctor.

COURT.—I presume it is counsel's purpose to show that during that time he has been receiving the regular salary.

Mr. ROCKWOOD.—Yes.

Mr DIBBLE.—No dispute about that.

Q. Is there anything you find that indicates that

(Testimony of Dr. John A. Saari.)

in the future he will be less able to work than he is now? A. I feel he is less able to work?

COURT.—Will he get less able as time goes on?

Q. No, you don't get the question. Considering he has [169—129] worked regularly for the past twenty months, is there any *indicate* that in the future he will be less able to work than he is now?

A. In his present health there may be some improvement, but it will be very slow, if any.

Q. Now most of this examination you made, Doctor, as to brain injuries, if any, was made on the basis of subjective symptoms, was it not?

A. The history was.

Q. And you spoke of the Romberg test. This test is not based on subjective symptoms, but even so a patient may produce an apparent positive result, though the actual condition of the brain may not justify a positive result; isn't that correct?

A. Well, if you are accustomed to watching this test, it can't be exaggerated or modified.

Q. It can be modified can it?

A. Somebody else who has not seen this test probably would think so, but a person who knows the sequence of events in the test can't be fooled.

Q. You were present also at the examination made by Dr. Pease, were you? A. Yes.

Q. Nausea is a very customary symptom for brain concussion, is it not? A. We have that.

Q. When did you make this examination?

A. Day before yesterday.

(Testimony of Dr. John A. Saari.)

Q. Doctor, how long have you been practicing medicine? A. Since 1916. [170—130]

Redirect Examination.

(Questions by Mr. DIBBLE.)

One more question: What effect, if any, would a fracture of the skull or concussion of the brain have upon the memory of the person that received such an injury?

A. Well, it can affect the memory very decidedly, as any injury to the brain may affect the memory.

Q. When it comes to this matter of his working, as counsel stated in his question, there is testimony that since April 1, 1929, Mr. Shellenbarger has been working in the postal station down here on Third and Oak, but there is also testimony that he can't remember, and that he can't carry on his work like he could before. State whether or not such a condition would be likely to result from a fall of this kind.

A. In my opinion it is very likely. With a fractured skull, one may get hemorrhage of the meninges surrounding the brain and have permanent effects which cannot be diagnosed clinically.

Q. Suppose this work of his requires writing, making out postal orders, people coming in there and wanting to send money to foreign countries, for instance; have to get the name and write the address, and do mental work; would an injury like he has here be likely to affect him any in carrying on that kind of work?

(Testimony of Dr. John A. Saari.)

A. It is possible, because sometimes there is failure to co-ordinate the ideas; the man's vocabulary may be limited.

Q. If Mr. Shellenbarger at this time is troubled with [171—131] a lack of memory and it is caused by the accident, what would be the likelihood of a recovery from that?

A. In my opinion it will be very slow, if any.

Q. Is there anything else, Doctor, that I haven't covered concerning this man?

A. I don't think of any.

Recross-examination.

(Questions by Mr. ROCKWOOD.)

Just one question. You didn't examine the X-rays that were taken of him, did you?

A. Not a complete examination. I wanted an X-ray; in fact went to the X-ray laboratory, but Mr. Robb refused to X-ray him because he had been X-rayed three days before and felt that two weeks interval should be given the patient for re-examination by X-ray.

Q. You didn't see the X-rays that Dr. McDaniel had taken a year or so ago?

A. Except from a distance over there.

Redirect Examination.

(Questions by Mr. DIBBLE.)

But this picture, Doctor, this exposure to the X-ray, picture taken three days before the time you wanted them, that was pictures taken by Dr. Pease, was it?

(Testimony of Dr. John A. Saari.)

A. Yes, sir.

Q. And so, if I understand you, Mr. Robb said it would not be safe for Mr. Shellenbarger now, at your request, to have more pictures taken?

A. Not for two weeks after. [172—132]

Q. Have to wait two weeks? A. Yes, sir.

Q. And do you know when it was that Dr. Pease took the pictures? A. I don't know, sir.

Q. The two weeks had not elapsed between that time and the time when you wanted to take some?

A. Mr. Robb said only three days had elapsed.

Witness excused.

Plaintiff rests.

Whereupon proceedings herein were adjourned until ten o'clock to-morrow morning. [173—133]

Portland, Oregon, Friday, Dec. 12, 1930, 10 A. M.

TESTIMONY OF DR. GEORGE NORMAN PEASE, FOR DEFENDANT.

Dr. GEORGE NORMAN PEASE, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Are you duly licensed to practice your profession as physician and surgeon in the State of Oregon?

A. Yes, sir.

Mr. DIBBLE.—We admit his qualifications.

Q. Doctor, have you done any special work or

(Testimony of Dr. George Norman Pease.)

had any special training in connection with injuries to the brain and spine?

A. Yes. During the war, when I went into Service, I was ordered by the Government to proceed to New York to enter a brain and spinal cord training course, which I took there. I was sent to Fort Oglethorpe in Georgia, where I taught that course to doctors going overseas, that is brain and spinal cord surgery.

Q. In your practice since that time, Doctor, have you had experience in connection with the diagnosis and treatment of injury to the brain and spine?

A. Yes, as I would see them in general surgical practice.

Q. Doctor, at my request did you make an examination of Mr. W. G. Shellenbarger within the last ten days? A. Yes, sir.

Q. What was the date of that examination?

A. I haven't the date down on my card, that is of the examination.

COURT.—What date did you say, Doctor?
[174—134]

A. I haven't the date down on my card, Judge. I will just have to assume when that was. I have omitted to put it down here, what time it was.

Q. Wasn't that Monday afternoon, about a week ago last Monday?

A. Yes, I think it was about December 1st, of this year.

(Testimony of Dr. George Norman Pease.)

Q. Now, Doctor, in making that examination did you take a history of this man as he gave it to you?

A. Yes, sir.

Q. Now tell us, will you, the history of the injury and the present condition as given you by the man.

A. Mr. Shellenbarger told me he had been hurt, and I asked him to tell all; I wanted to know about this accident. I asked him to tell me in his own words how he had been hurt, and I put down the history as he gave it to me. He said on July 13, 1928, while he was walking along the aisle of a moving train he suddenly remembered nothing; was walking along the aisle of a car or a moving train; he remembers nothing afterwards until he awoke in a hospital. This was in—he *work* up sixteen hours later in the Glasgow hospital. He further said that he was supposed to have had a fracture of the skull; that he remained in this Glasgow hospital for two weeks' time, and then he was removed to Portland. He had a cut over this right parietal eminence on the head, in this region right here; he said he *was* no paralysis as a result of that fall; he had some pain at the base of his neck, but that his first complaint following the accident were body pains all over the body, bruises and headache, and difficulty in raising his right arm very high up. He further said that there was no vomiting; that there was no bleeding from the nose and ears, which we question very carefully [175—135] in cases of head injury. He *said was* no bleeding from the nose or ears; then I asked about his urine, because

(Testimony of Dr. George Norman Pease.)

in these cases, where a man is in a coma or unconscious he often has to be catheterized; he does not void; he has to be watched in that condition; he said he did not have to be catheterized. Then after two weeks moved from there to the Good Samaritan Hospital in Portland, where he came under the care of Dr. McDaniel. He told me that while in Portland his skull was X-rayed, and they told him there was a fracture of the skull. I asked about when he was in the Good Samaritan Hospital; he said he was there about two months, and that he had a long, slow convalescence, and that his chief complaints while here in the hospital were pain in the top of his head and poor appetite, and he slept rather poorly. Then I asked him on the day I examined him, December 1st, of this year, what his complaints were to-day as a result of the accident, which happened back in 1928. He said the chief complaints to-day were pains in the head, especially when he had to concentrate or think about anything; that he couldn't be hurried in making a decision. I asked if he was working; he said yes; asked what he was doing; he said he was employed in the postoffice, superintendent of a post-office station, and he said that was the same work he was doing before he was hurt; said he didn't have this trouble in concentrating on things, and having to take time to think them out—he didn't have that trouble before he was hurt. I asked him about getting up at night to urinate, how he could get along at night; he said for the last five or six

(Testimony of Dr. George Norman Pease.)

months he had to get up at night to pass urine, which is a natural thing at his age; bowels somewhat constipated. I think [176—136] still a couple of other complaints here. After leaving the hospital I asked him about his condition then. He said he was still having pain in his right shoulder; that this shoulder bothered him only in reaching high up. This is the history as I got it from Mr. Shellenbarger.

Q. Up to this point in the testimony, Doctor, you have told us simply what was told to you by Mr. Shellenbarger?

A. That is his history of the case

Q. Now, did you take any X-rays in connection with this man—X-rays of the skull?

A. Yes, sir.

Q. You have those with you?

A. Yes, I have.

Q. I offer these X-rays in evidence as defendant's exhibit—four X-ray pictures of Mr. Shellenbarger's skull, two of them being Mr. Shellenbarger's skull 12/1/30, and four of them reveal Mr. W. G. Shellenbarger's cervical spine.

Mr. DIBBLE.—No objection.

(Marked Defendant's Exhibit "A.")

Q. Now, Doctor, that X-ray, Exhibit "A-1," with the illuminator; will you please point out to the jury what, if anything, these four plates show as to the present condition of the skull, and the other parts of the body that you have taken. They were all taken the same day.

A. This first one is a picture taken clear through

(Testimony of Dr. George Norman Pease.)

the skull as though looking straight at a man's forehead; this is the right side; this is the left; the orbits in this region are where the eyes are located; nostrils in the center. It shows completely the outline of the skull; these little places you see in here, irregular places, are simply [177—137] where the bones of the skull come together, because the skull is not just one solid bone, although we are solid ivory occasionally; there are several bones in the head; they articulate and fit in with one another; that is just where these bones fit in together; no fracture or anything wrong. This picture does not show any sign of any fracture of the skull, in fact it shows nothing wrong with the skull. This "A-2," as you can plainly see, is just a lateral view as though the man standing here and looking to the side; you are looking at the right side of the head; the front of the skull here, back of the skull here.

Q. From that, Dr. Pease, is there any present evidence of injury to the skull?

A. No. I might say that, leading up to it, on this here it might look as though there were breaks, but these are just blood vessels that are—that lie on the inside of the skull, right in the bone, and is not a fracture; just blood vessels which supply the brain; this is also a perfectly normal picture of the skull, and shows no fracture or anything wrong. "A-3" should be the same as the others; these are just stereopticon plates, so you can look at

(Testimony of Dr. George Norman Pease.)

two at once to get depth as well as flat surface. So this is practically the same as the other.

Q. What is the fourth one for?

A. Mr. Shellenbarger was complaining of pain in his neck as well as in the head. This picture was taken to show the neck from the base of the skull to the top of the chest—"A-4"—these seven vertebrae which are in the neck, seven cervical vertebrae, and these are the spines in the back of the neck; and this picture also shows absolutely normal outline and [178—138] nothing wrong with the vertebrae from the base of the skull down to the top of the chest.

Q. As we look at the picture, the left side of it as it is on the machine, is the patient's back; is that right?

A. This is his back; these are the spines which are in the back; he would be facing just as I am facing you now, across this way.

Q. Dr. Pease, this is an X-ray picture which Dr. McDaniel testified was taken, I think the 27th of July, 1928, within a day or so one way or the other, and from that he testified as to the condition of fracture at that time; will you look at that and see if you can see, or verify or determine whether there is a fracture of the skull as shown in that picture.

A. Well, here again are those blood vessels that we spoke of, lying on the surface of the brain and next to the skull, and here is the marker drawn down here which shows this line across here—here

(Testimony of Dr. George Norman Pease.)

—right here, come up so. This looks like what we call a line fracture; that is a crack like you would have in an ordinary dinner plate, which you could still use, but just a crack across the plate—the plate is still intact, perfectly level on both sides, but a crack across it; a linear fracture involving this parietal bone on the right side of the skull, and apparently about three inches in length.

Q. Now, Doctor, I show you two other X-rays, the first being Plaintiff's Exhibit 3, a picture of the right shoulder of Mr. Shellenbarger, taken at the same date in July, and Plaintiff's Exhibit 4, which is another picture of the right shoulder taken on February 16, 1929. Now, will you commence, [179—139] please, first with exhibit 3, as to the condition in July, 1928, and then exhibit 4, in February, 1929.

A. Well, I don't know—what is this? This is exhibit 3?

Q. Yes, exhibit 3.

A. This plate was taken when?

Q. July 27, I think it was, 1928, about two weeks after the accident.

A. Well, here is the collar-bone or clavicle coming out here. This is what we call the scapula or shoulder-blade, which lies behind, and the two things come forward; one comes out here to complete the shoulder-blade; the other projects right through here; here is one that projects right straight through; here is one that comes up from the back; these are both on this wing; that is the

(Testimony of Dr. George Norman Pease.)

scapula; the shoulder-blade, and the back. It does not show very much wrong. There perhaps, about right here—there appears to be—let's see what this other picture shows; that is about the same. There appears to be right here—this is what we call the Glenoid cavity; that is just a cavity about that size on the shoulder-blade in which the arm fits to make the shoulder joint. This looks as though might be a little piece of the bone torn loose just below the Glenoid cavity, which forms the shoulder joint. I don't know whether I make that very plain or not.

Q. Is that injury you point out in the joint itself?

A. As outlined, this joint, it looks as though it comes right down here; right across there, and that this lies just below the shoulder joint; right in here; the line, the joint line is right around there.

Q. Now, take a look at the next plate, Doctor, that is [180—140] referred to as Plaintiff's Exhibit 4, which was taken in February, 1929, some eight or nine months later, and tell us what that indicates as to the then present condition of that injury to the right shoulder.

A. This is practically the same as the other plate as near as I can see; this was taken later, the next year, 1929—right side. That same little defect shows, this spot apparently a quarter to half an inch long, and apparently just below the shoulder joint line again, which I think you can see outlined

(Testimony of Dr. George Norman Pease.)

here—see? This is the arm bone here. I would say these are practically identical, these two plates.

Q. Now, from these two plates would you be able to give an opinion as to the healing process, if any, which took place between the time these two plates were taken?

A. I see very little difference in the two plates.

Q. All right, Doctor; will you take the stand. Now, Doctor, tell us what test or examination you made of Mr. Shellenbarger, to determine the cause if any of the discoverable complaints which Mr. Shellenbarger stated to you.

A. State what investigation I made as to the cause of his accident, or what I found?

Q. No, as to the cause of his present condition, and as to what his present condition is.

A. Oh, in other words, what I found in examining him?

Q. Yes.

A. Well, the thing to determine, of course, in the case of Mr. Shellenbarger, admitting the fracture of the skull,—was there any injury to the brain, because a fracture of the skull, that linear fracture that shows there, means little if anything; we see people, boys of eleven, going to school [181—141] within two weeks of a fracture of the skull; there is no injury to the brain; a man has a fracture of the leg, then it is different; he cannot walk, but he is not using his head—we use our head to think with, so a fracture of the bony part of the skull, of that thin linear type, means little or noth-

(Testimony of Dr. George Norman Pease.)

ing unless there is injury to the brain beneath; in that with a fracture of the skull, like hit with a hammer, or fall from a height, so that the bone would press in and press on the brain, then it would be quite a different thing; be serious brain symptoms which have to be attended to immediately. But just a crack in the skull, like a crack in a plate, an ordinary dinner plate, is not important in itself, unless there is injury to the brain. As I say, I have seen children—have them here in Portland, within the last year—hit by an automobile and fracture the skull,—demonstrated by the X-ray—at school in two weeks' time. So the question here is was there injury to the brain. How are we going to tell that—that injury to the brain following a fracture of the skull; in the first place, what injury will the bone do? If the bone is depressed, knocked in, presses on the brain, it causes serious injury, epilepsy, coma, paralysis, and other things; if the bone is not doing that, as it does not seem to be doing in this case, then is there any bleeding as a result of this fracture that will press on the brain? Because the brain fits the skull just compact, like a hand fits the glove; can't stand much pressure; no room for anything much in there; so if as a result of this fracture there is bleeding from these blood vessels shown on the bone, would it compress? We get from that comatose, unconscious condition, sometimes [182—142] lasting eight or ten days; this blood would irritate the surface of the brain; we have areas on the brain that correspond to our

(Testimony of Dr. George Norman Pease.)

different parts, our face, our hands; thus as you see when a man is suddenly struck with something he wakes up and the whole side of his body is paralyzed; just a little bit of crush in the brain, maybe no bigger than a ten-cent piece, and the whole side will be paralyzed due to pressure. An examination was made of this man's nerves; there are twelve nerves, which we call the twelve cranial nerves, coming from the brain, the nerves of smell, the nerves of sight, nerves that supply the muscles of the eye-ball and so on, up to twelve; I examined all of these nerves in Mr. Shellenbarger; I found his sense of smell all right; sense of sight all right; the muscular sense—his pupils react at daylight but contracted when I used light and dilated when I took it away. In other words, I was not able to find anything wrong with these cranial nerves. I found no paralysis in the arms or legs; I had him walk; his gait to me is a normal gait, normal walk. I tested his reflexes, which is a symptom; we tap on him, which goes to the spinal cord; there is an impulse there that comes back again to the muscles, and we get contraction; if we get that we know that part of the spinal cord is all right; a few other tests—I don't want to go too far into this, so just a couple. There is the Babinsky test, which is scratching the sole of the foot; he was perfectly stripped during this examination, and if the big toe turns up when we scratch the sole of the foot with a pin, it means an involvement of the spinal cord. His toe did not turn up; made a perfectly

(Testimony of Dr. George Norman Pease.)

normal reaction; one of the tests I made is [183—143] the Romberg test, which is to have a man stand up with his heels together and toes together, and hands at his side, and then have him shut his eyes to demonstrate whether there is any ataxia, loss of equilibrium, staggering, etc. We hold the arms around them when they do that so they don't fall; he was perfectly normal he stood there, and I guess could have stood any length of time without wobbling, waving or falling; I tested around the abdomen, the cremasteric test, around the testicles; they were all normal; did just what they should do. Do you want me to go to the shoulder joint or just the brain?

Q. If you are through with the tests you made as to the brain I want you next to tell us what you did to determine the present condition of the shoulder.

A. I haven't brought out—I remember Mr. Shellenbarger complained about concentration and something was said about memory; we don't know a great deal about the brain; but the higher centers, memory, etc., are supposed to be located in the front lobes, in the front part of the brain where this injury was not; but nevertheless he remembered things. I remember one instance coming up; he asked me about my name and spoke about my grandfather, who was a Mason; he knew all about him; he has been dead twelve years now, I think; little things like that that came up during our conversation, convinced me that Mr. Shellenbarger

(Testimony of Dr. George Norman Pease.)

had no distinct trouble with his memory; lack of concentration; his questions—while he didn't respond quickly to me, like that, nevertheless his responses were thought out and careful and as far as those parts of the brain, memory and concentration, which are rather indefinite, it [184—144] seemed to me that he cerebrated; he replied normally to questions; his memory was all right. Naturally I inquired about his job. If a man is having trouble with his brain, can't remember, can't concentrate, he can't very well hold a job down, which is a postmaster job, money orders, etc., every day, and he told me—I believe I am correct—that he was doing the same job that he was doing before this accident happened, which also meant to me that the brain must be functioning in a pretty normal manner. I think that covers as I can recall.

Q. Come next to the shoulder, Doctor, and tell us what you did with respect to that.

A. The shoulder joint there had been some injury to, and as shown by the X-ray picture; that was of course a couple of years ago; the question to-day is has that shoulder embarrassed the use of his right arm at all, which is rather important. I found that he had practically all the motion in the shoulder joint, abduction, adduction, supination, all the things to do around the joint, with one exception. When I asked him to reach high up, I don't think he could get his arm up as straight as the left one, the good arm. In other words, there was some limitation of motion noted in getting

(Testimony of Dr. George Norman Pease.)

the arm high up. He could get it out, I would say, about like this, perfectly well, but a little higher than that the motion was limited; it might be due to this little fracture in the shoulder blade, that I saw lying just below the shoulder joint. But to me that is not a big thing, it is rather a small thing. And I think he has very excellent use, I would say, of his right arm.

Q. Now, from your examination, Doctor, what would you conclude as to whether or not there was any actual injury to the brain [185—145] at the time he sustained this fracture of the skull in July, 1928?

A. There is only one thing to explain in that, and that is this unconsciousness which he said existed for sixteen hours; after walking along the aisle of the car, he says he doesn't remember anything until he woke up in the hospital. Merely a period of unconsciousness all that time means a brain disturbance. But checking up on that we found no evidence of any paralysis anywhere. We found when we—now this fracture you saw in the plate, as I told you, went right above the right ear, and back this way for a distance of about three inches. A fracture of that kind, if there was no injury to the blood vessels, a simple crack of the bone, means nothing very much. If any injury to the underlying parts, take the blood vessels which line the skull, which you see there, if that was torn the blood is going to bleed right down, and we get the blood coming out of the middle ear. That is the reason

(Testimony of Dr. George Norman Pease.)

we ask about these symptoms in any skull injury. No bleeding from the ear in this case, no vomiting. There were none of those things which can point to any disturbance of the cranial nerves; no trouble with sticking out his tongue, opening and shutting his mouth, opening and shutting his eyes. All these come from nerves at the base of the brain. All those things were lacking, and it is only those sixteen hours there where unconscious that would indicate there was brain injury. But in all the other tests that I made I could find no evidence of any injury to the brain. I am inclined to think unconsciousness which lasted that long—which of course I don't know, I get that from his history—that it [186—146] was more or less of a shaking up—stunned, than any serious injury—injury to the brain in stunning it. That would have shown by all the tests we could make now, if there had been any injury to the brain. Those are what we get when we talk about an attack of epilepsy from an injury to the brain, of course, but where we do injure the brain, there comes little healing, or little scar tissue, then we get these attacks you hear about, people falling on the street, and by the time somebody gets there and picks them up, they recover; a little attack of epilepsy, something like that. A good many of these come from these injuries that injure the brain; not only fracture of the skull, but injure the brain. I could find then, as far as I am concerned, no evidence of injury to the brain, or

(Testimony of Dr. George Norman Pease.)

the covering of the brain, or the blood vessels, or the nerves of the brain.

Cross-examination.

(Questions by Mr. DIBBLE.)

Dr. Pease, you are associated, are you not, in your practice, with Dr. Chipman?

A. We are not associated; we share the same reception-rooms. We are not associated at all, any more than you and I are.

Q. But you occupy the same offices?

A. No; we have the same reception-room.

Q. And does Dr. Chipman have a son who is a lawyer? A. Yes, sir.

Q. And is this son employed in the office of Carey & Kerr?

A. Yes, he is in Carey & Kerr's office.

Q. And they are, as you know, attorneys for the Great Northern Railroad?

A. I believe they are. [187—147]

Q. And from that office comes Mr. Rockwood, to try the case here?

A. As far as I know, that is all correct.

Q. And the examination, Doctor, which you made on the first of December of this year, was made in behalf of the Great Northern Railway Company?

A. Mr. Rockwood called me up and asked me to examine this man, yes.

Q. Then you expect to be paid your witness fees by the Great Northern Railway, or by Mr. Rockwood, representing it?

(Testimony of Dr. George Norman Pease.)

A. I certainly am not working for nothing. Yes.

Q. And the examination which you made was made for the purpose of enabling you to come here at the trial of this case and testify as an expert witness in behalf of the Railway?

A. All right, that is one way of putting it. But, if I may put it in my own words, it seems very important; I examined this man with a perfectly open mind, knowing nothing of this accident, to see how much he had been hurt as a result of this accident. That is the way I would approach the case. All of what you say I think is quite true also.

Q. The purpose of the examination, when you come right down to it, was to enable you to come here as a witness and give your opinion as to this man's condition?

A. Absolutely. I was to testify exactly what I thought Mr. Shellenbarger's condition was.

Q. Now then, at the time you made the examination, which was made in your office, was it not, Doctor?

A. Yes, sir.

Q. And there was not present with Mr. Shellenbarger at that time any attorney?

A. No attorney was present, that is true. [188—148]

Q. Dr. McCorkle and Dr. Saari were both present during the examination?

A. Yes, the two doctors were with me.

Q. And they told you, or you understood that they had been treating this man. Is that correct?

A. Well, I simply assumed, inasmuch as they

(Testimony of Dr. George Norman Pease.)

brought Mr. Shellenbarger to my office, that they were his doctors; yes, that he was under their care.

Q. But there was nobody there in his behalf, representing him legally?

A. No, we didn't have any attorneys present during the medical examination.

Q. Now then, with regard to getting the history of the case, Doctor, isn't it true that you did no more than any doctor does, examining under these conditions, endeavoring at the outset just to find out in a general way what had happened, as a basis for your further examination?

A. I think that is correct—what was that question?

(Question read.)

A. What do you mean by "did no more." "Know," or "no." I don't know what you are driving at.

Q. "No."

A. I did no more; you mean made no more examination?

Q. No.

A. Well, if I understand, I don't think that I can—

COURT.—I suppose what counsel means, did you follow the usual course that all doctors do in making examinations, in getting the history?

A. Well, yes, as I think I understand it. [189—149]

Q. What I am getting at, to make it a little more concrete, you were not at that time attempting,

(Testimony of Dr. George Norman Pease.)

when this man's lawyer was not there, to pin him down minutely as to the precise facts under which the accident occurred, for the purpose of using that against him for instance in his trial here; you were just inquiring generally what had happened to the man. Isn't that true?

A. Well, I make as careful—I get as careful a history as I can to find out how a man was hurt; that has some bearing on the case, how far a man falls, how he is hurt. I get as careful a history as I can of how the accident happens, and as carefully as I can I make my examination, to find out what are the results of that. Does that answer the question?

Q. Well, in a way it does, and not quite fully, either. Isn't it true that Mr. Shellenbarger told you he was thrown from a train, and fell a distance?

A. Thrown from a train? No, he gave me a history, as I understand it—well, he—no, he didn't say anything about being from a train; he said he was walking along the aisle of a moving train, and everything became blank. The next time he woke up he was in a hospital.

Q. Didn't you understand this man fell from the platform of a train, to the right of way?

A. I know nothing about where he fell; I just got that history.

Q. The man told you—

A. That is all he told me.

Q. In giving this testimony before this jury then, that this man hasn't anything wrong with him, you

(Testimony of Dr. George Norman Pease.)

are not basing that upon the real facts which existed, are you?

COURT.—Basing it on what the plaintiff told him. [190—150]

A. I admit that.

Q. Do I understand that you don't know now, in giving your expert testimony—are not assuming that the man did fall to the right of way and strike on the ground?

A. As far as my testimony goes it is made on what Mr. Shellenbarger told me; he became unconscious, he awoke in the hospital, he had a fracture of the skull, and an injury here—all those things I have gone into, that is all I know.

Q. If the fact is, Doctor, he was thrown from the train and fell a distance from the platform of the train, down to the right of way, if that is a fact, and struck violently and was rendered unconscious, that would make a difference in your testimony, wouldn't it, as to what injuries came from that?

A. No. The main thing in my testimony is what I found—what I find—if he fell from a moving train, that doesn't alter things at all.

Q. Didn't you say the question of how far a man falls had some bearing?

A. I mean by that, three or four stories, something like that; a real high fall.

Q. Can't you get a pretty bad injury to the head by falling six or seven steps? A. Sure.

Q. And striking on the head? A. Absolutely.

Q. And wouldn't you have a—isn't it a fact that

(Testimony of Dr. George Norman Pease.)

if this man did fall that distance, that would make a difference in what occurred to him?

A. Why not at all. [191—151]

Q. Now, going back again, I want to get that just cleared up, because I think I understand what you are trying to do. Isn't it a fact that when you talked to Mr. Shellenbarger about what had occurred, you simply talked generally with him, to get a general idea of what had happened?

A. No, I tried to state it, Mr. Dibble, that I wanted to get his own words just what happened to him, and I approached this thing with an open mind, knowing nothing about his accident, how badly he was hurt, and have him tell me, and those are his words to me, and that is what I have.

Q. Were you, in the absence of this man's counsel, trying to pin him down minutely as to just how he fell, for the purpose of using that against him at any future time?

A. No. Else I would probably have gotten into this—I read that over to him, and asked him, because it is rather unusual to have a man walking along an aisle of a moving train—that is the way he told me—and become unconscious and wake up in a hospital. You would think he would tell me he fell, or something like that; but those are his words, just as he put them to me, walking along in the aisle of a moving train. Maybe he would like to explain more, but I went over it twice with him. I remember reading his words, and that is exactly as he told it to me.

(Testimony of Dr. George Norman Pease.)

Q. But you were not trying to pin him down like a lawyer would, and get the fine points about it? All you wanted to know would be just the general points, what happened to him?

A. I don't think I could do that if I tried.

Q. The testimony is as it shows here; he was unconscious, and he woke up in a hospital after it happened, and what [192—152] he told you is in accordance with the testimony here. Now then, Doctor, you said there was no paralysis. Can paralysis result from injury to the brain?

A. Can paralysis result from injury to the brain? Why yes.

Q. And blows upon the head. For instance, a blow on one side of the head, as I understand it, may affect the lower extremities on the opposite side? A. It does.

Q. And the same thing is true the other way?

A. Yes, sir.

Q. So we do have in medical science many cases where they do receive blows upon the head and injuries to the brain which does result in paralysis?

A. Absolutely.

Q. And it can be so strong as to destroy a man's use of his limbs entirely, can't it? There can be total paralysis.

A. Wait a minute. Total paralysis?

Q. From a blow on the head, or from an injury to the skull.

A. Wait a minute. Total paralysis? You mean both legs?

(Testimony of Dr. George Norman Pease.)

Q. Anything. A. You cover an awful field.

COURT.—No evidence of paralysis.

Q. I am coming to another question.

COURT.—Go ahead with the question, and confine it to the issues in this case.

Q. Then Doctor, can there be a total, or partial paralysis of one or both legs, by reason of a blow upon the head and injury to the brain?

A. If it was bad enough.

Q. Beg pardon? [193—153]

A. If it was bad enough there would be death; that would be total paralysis.

Q. There are cases, of course, where a man strikes that way and is killed outright? A. Absolutely.

Q. Now, suppose the blow upon the head was not severe enough, or the injury was not severe enough to the brain, to actually destroy, to paralyze either one of the limbs, would it not impair the use of the limb to a limited extent? Couldn't a blow upon the head impair a man's gait, make him walk after that in a shuffling manner, even though not paralyzed. As the Court says, and I am not claiming this man's legs are paralyzed, but leading up to the other proposition, if a blow upon the head will absolutely paralyze a man, is it not also true that a blow not quite so severe can seriously injure a man's leg and impair the use of it, even though it does not totally paralyze it? Couldn't that happen?

A. The limb can be partially paralyzed, yes.

Q. And if this man here had no trouble in walking before he was hurt, on the 13th of July, 1928,

(Testimony of Dr. George Norman Pease.)

and ever since that time he has had an impairment in his gait, couldn't that come from this accident?

A. It could come from the accident.

Q. And if, for instance in walking along the street, where he is going to go up on the curb, for instance, and where he is going to walk up to that witness-chair where you are, he has difficulty and he stumbles, isn't able to raise his leg properly to the required height, could that condition not come from the blow upon the head? [194—154]

A. May I ask a question in answering that? The one before this, could this accident have caused a disturbance of the gait? Does that mean with Mr. Shellenbarger, or with anybody?

Q. Anybody.

Mr. ROCKWOOD.—The questions to date are just general questions.

Q. Yes, anybody.

A. All right. Then the answers are the same.

Q. Because I am not asking you to say you believe what this man says at all; that is for the jury to say. A. I understand that.

Q. I am asking you, Dr. Pease, a question based upon his testimony, because he testified he has—

COURT.—Ask the question and don't argue.

Q. He does have an impairment? That makes it clear to you, Doctor?

A. Yes, I think I understand.

Q. And if ever since the accident Mr. Shellenbarger has difficulty in getting his feet to the required height in walking, that could follow from this accident?

(Testimony of Dr. George Norman Pease.)

A. Now, this is a point in Mr. Shellenbarger himself, as I understand. The first were general questions. Now you ask if as a result of this accident—this difficulty in raising his foot is a result of this accident?

Q. Could that result from the accident?

A. Could it result from the accident?

Q. Yes. A. Yes, it could.

Q. And if that continued now for two years after the accident [195—155] occurred, does that indicate that he has recovered from it, or otherwise?

A. Well, assuming that this did result, which I don't believe it did, and that he still has difficulty, then you would naturally say he had not recovered. I think that is simple.

Q. If he has not recovered now, there is not much likelihood he will. Is that true?

A. I don't know about that at all. But this is a hypothetical question, isn't it?

Q. Yes.

A. Let's see. Two years and over since the accident, isn't it?

Q. Over two years, you say, Doctor?

A. And if he had disturbance of gait—if a man had disturbance of gait two years after an accident, yes, you would think it might remain permanent, if it remained that long.

Q. You would naturally think in that time it would be cleared up if ever going to be. He complained, you say, of pain all over his body, and bruises, and headaches? A. Yes.

(Testimony of Dr. George Norman Pease.)

Q. Now, this matter of headache, Doctor, isn't it a fact that a chronic headache follows in a great many cases from fractures of the skull?

A. Generally the headache is not chronic; it is at the time of the accident, and it is generally over shortly after that, unless there is serious injury to the brain.

Q. What do you say about the general proposition, as to whether or not headaches do not frequently arise from fracture of the skull and from blows on the head?

A. They frequently arise at the time of the accident, and they would not continue unless there was brain injury. [196—156]

Q. Now, Doctor, you have made a specialty of brain injuries, and injuries to the spinal cord, as you have testified, in your service in the army. I may ask you if you are familiar with Scudder, a writer on the treatment of fractures? Is he a recognized authority on fractures?

A. Yes. Not so much fracture of the skull, as fractures of the extremity bones, and others. He is an authority on fractures generally.

Q. You are familiar with the work he has written on "The Treatment of Fractures." I don't mind showing it to you if it will help you. You are familiar with Dr. Scudder's work on "The Treatment of Fractures"? A. I have his book, yes.

Q. Is he a recognized authority on fractures?

A. Yes, Dr. Scudder is a recognized authority on fractures.

(Testimony of Dr. George Norman Pease.)

Q. I want just to call your attention to a matter here—you can follow along if you wish. He says here “Unfortunately immediate recovery from a head injury may not always imply permanent health.” And then it says down here: “The following are found to be some of the later effects of head injuries; Chronic headache which may be general, over a large (frontal, occipital, etc.) area of the head, or local corresponding to definite scars in the scalp, or to tender areas upon the skull or neuralgic-like along the course of certain nerve trunks. Along with these chronic headaches are associated insomnia, mental depression, loss of appetite, inability to do any work, and a characteristically marked aspect.” Refreshing your recollection or rather directing your attention more particularly to the situation, from this authority, isn’t it a fact, Doctor, that chronic headaches frequently occur [197—157] from fractured skulls, even though the fracture heals and apparently is cured up?

A. Just as I said before, the headache at the time of the blow of the head, even though it may be very slight, is quite common, that is have headaches; chronic headaches, to persist years afterwards, if that were true, we would think that there may have been an injury to the brain, and the healing of scar tissue, etc.; we try and work that out.

Q. Now, a man getting a blow on the head, it is not exactly like hitting a dinner plate, as you described there. There are sensitive parts under that bone, and if this man were hit hard enough to crack

(Testimony of Dr. George Norman Pease.)

that bone there, it very likely disturbed something under that bone, didn't it?

A. No. That is the reason nature constructed the skull so, to protect the brain from injury; you get just a crack to this bone without any injury to the brain whatsoever. The skull is constructed for that very purpose.

Q. Aren't there lots of cases, Doctor, where there is no breaking of the bone, and yet there is a severe concussion of the brain?

A. Concussion? Yes.

Q. Injury of the brain, even though the covering of it, the bone, is not broken?

A. Yes. But understand, concussion now, means no injury to the brain; concussion of the brain means no injury to the brain.

Q. What is concussion?

A. Just simply stunned, shaking up of the brain. No demonstrable tearing of blood vessels or nerves, or anything that [198—158] can be shown. Just shaking up, or stunned, that is concussion.

Q. Now, if that shaking up and stunning can occur in cases where the bone is not broken even, most certainly it can occur where the bone is broken, can't it? A. Certainly.

Q. And it would be a more severe shaking up, and a more severe stunning if the bone was broken?

A. Quite right.

Q. Isn't it a fact that a man could get that kind of a blow, and that kind of an injury, and the fracture would unite, and yet that man suffer from

(Testimony of Dr. George Norman Pease.)

headache for years even, or more, after receiving the injury?

A. Well, I must ask again, if that applies to this individual?

Q. It applies in this way, that he has testified that he does have headache.

COURT.—The only question he is asking now is expert, Doctor.

A. Just a general question.

Q. General question.

A. Then let's have it again.

(Question read.)

A. That kind of a blow, that kind of an injury, could injure the brain also, if he suffered with chronic headaches for years after the accident.

Q. And this dizziness and deafness often occur with this sort of injury?

A. With skull injury dizziness and deafness often occur.

Q. So you agreed generally with the author here, with which you are familiar?

A. Yes, absolutely. [199—159]

Q. Now, Doctor, in answer to one of counsel's questions, you emphasize the fact that Mr. Shellenbarger is now working and you drew certain conclusions from the fact that he is down at the post-office, and is putting in the same hours, and drawing the same pay. But did you understand, Doctor, that he has had great difficulty in doing this work? Were you told that by anybody?

A. No, no.

(Testimony of Dr. George Norman Pease.)

Q. You are assuming that he goes down there and draws his pay and puts in the hours, and you are assuming also that he is functioning down there the same as he did before he was injured, aren't you?

A. Yes, I am assuming that if he wasn't doing his work, he wouldn't hold his job.

Q. Yes, but the boys say they are helping him, they are carrying him?

COURT.—Never mind what the men testify to.

Q. So now I am going to ask you this: If it is a fact, Doctor, that while he goes there to work, that he becomes confused, and can't remember, and can't make out his money orders like he used to, and at times he lies with his head in his hands, suffering from headaches, if that is the way he is doing his work, what would you say as to whether he is permanently injured or not?

A. This would have a bearing on it, naturally. But he didn't complain of this to me, when I was examining him, when he told me his history.

Q. I am not asking you to say that what he says is true, but if it is true that is the way he is working, that would alter [200—160] your testimony with respect to his capacity to work?

A. Why, yes; if a man told me he couldn't do his work that he was doing before, and of laxness, I would think different. But I would have to prove it by the other means, you know; I couldn't take his word for it, I would have to prove it by examination.

(Testimony of Dr. George Norman Pease.)

Q. This first picture, looking right at the head, that of course shows no fracture; but the second picture, the second and third, in fact, all our pictures—

A. Yes.

Q. They do show a linear fracture of the skull?

A. Yes.

Q. Three inches in length? A. Yes, sir.

Q. And now is the fact that the pictures which you took of the skull, which you took on December 1st—the fact that they don't show any fracture at this time, that doesn't prove that he did not have a fracture, does it? A. No.

Q. Because—

COURT.—That is enough; he has said no.

Q. And he complains of inability to use his right arm and shoulder, and there is a fracture shown even on your picture, isn't there, of the shoulder? Or is that one of Dr. McDaniel's?

A. I haven't any picture of the shoulder. I was talking about your pictures.

Q. You took no picture of the shoulder?

A. No.

Q. The pictures that Dr. McDaniel took of the shoulder do show a chipping fracture, don't they, of the right shoulder? [201—161]

A. I called it the shoulder-blade; a little chipping of the shoulder-blade below the shoulder joint.

Q. Now, you spoke, Doctor, about the cases you have had where children, young children, get blows on the head, and then they went to school, after having a fracture of the skull, inside of a week or two, etc. Now I want to ask you if the age of a

(Testimony of Dr. George Norman Pease.)

person doesn't have something to do with what might happen to them if they had a fracture of the skull?

A. Yes; but I would rather be—have a fracture of the skull at sixty, than I would at the age of ten or eleven.

Q. But age does make a difference?

A. Absolutely.

Q. If this man was sixty-one—I think he says he is sixty-three now—if this man was sixty-one when he received this injury, don't you think that he would have more trouble in recovering from that, than he would if he were a younger man?

A. Yes, at the age of twenty or thirty, along there.

Q. Suppose instead of being that age, he is in middle age. For instance a man of thirty-five, we will say, or something like that, a man of that age would get a better recovery than this man would, wouldn't he?

A. Would expect him to; he would have better resistance, certainly.

Q. The fact that he was sixty-one when he got hurt is a serious factor, isn't it, Doctor? In his case? A. Certainly a factor.

Q. As far as recovery is concerned? A. Yes.

Q. And, if it is a fact that the man was unconscious when he [202—162] was picked up on the right of way, and remained unconscious for sixteen hours at least, if that is true, that shows right there that he had a brain injury, doesn't it?

A. No.

Q. Some evidence of brain injury, isn't it?

(Testimony of Dr. George Norman Pease.)

A. We would certainly look for one, with that history.

Q. And the epilepsy you spoke of, that can come along too, can't it, in cases where a man has a blow upon the head, and is seriously injured?

A. Yes, sir.

Q. Are there any cases where a man, especially an elderly man, receiving a severe blow upon the head, where they have apparently recovered, or at least the fracture was healed up, and years after it happened he develops epilepsy?

A. We have already stated was two years since his accident. If there had been any injury to his brain, certainly in two years—we have already testified to that—that his injury would probably remain as it was. In other words, as you said, if he had this disturbance it would probably remain so, but it might be a process—

Q. Well, I want—

A. Just a minute. The same thing applies if he had an injury to the brain, scar tissue, the healing would have occurred long before these two years, but he would be having the epilepsy spells now if he is going to have them at all.

Q. But there are instances aren't there, Doctor, recorded instances, where even a longer period than two years following a blow upon the head, and epilepsy has developed?

A. There are reported cases, yes. [203—163]

(Testimony of Dr. George Norman Pease.)

Redirect Examination.

(Questions by Mr. ROCKWOOD.)

Now, Doctor, you have been asked various hypothetical questions as to whether certain things in the nature of impairment of the gait, stumbling, etc., headaches, dizziness, and inability to concentrate, might result from a blow on the head sufficiently severe to fracture the skull. I just want to ask one question. In your opinion was there brain injury as a result of Mr. Shellenbarger's accident—

A. There was not—I beg your pardon.

Q. —which results in injuring the nerves controlling the locomotion, and nerves which affect headaches, and nerves which bring in dizziness, etc.—did such a result follow Mr. Shellenbarger's injury?

A. No, there was no such injury, or no such result.

Witness excused. [204—164]

TESTIMONY OF J. M. HANLEY, FOR DEFENDANT.

J. M. HANLEY, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Mr. Hanley, by whom are you employed?

A. Great Northern Railway Company.

Q. Where? A. Havre, Montana.

Q. And what is your position with the Great Northern? A. I am a Division Engineer.

(Testimony of J. M. Hanley.)

Q. What is your capacity, civil engineer?

A. Yes, sir.

Q. Not an electrical engineer? A. No, sir.

Q. Are you familiar with the location of the tracks of the Great Northern Railway Company on its right of way at the station of Saco, and for a distance two or three miles west thereof, as they existed on July 13, 1928? A. Yes, very familiar.

Q. That stretch of track was within the territory in which you are occupied? A. Yes, sir.

Q. Now, at that time, in the middle of July, 1928, was there construction work going on at or near the station of Saco? A. Yes, there was.

Q. What was the general nature of the construction work—not the details, just the general nature?

A. They were constructing a branch line from Saco north to the Town of Turner; they were also making a connection [205—165] from the depot at Saco to this proposed branch line.

Q. Have you prepared a blue-print showing the lay-out of the operated tracks as they existed July 13, 1928? A. Yes, I have.

Q. Is this blue-print which I have in my hand and show to you the one prepared by you?

A. That is the one, sir.

Mr. DIBBLE.—I would like to ask a question: When was the map made?

A. The map was made last—a week ago today, Friday and Saturday.

Mr. DIBBLE.—When was the data gotten from which it was made?

(Testimony of J. M. Hanley.)

A. It was gotten in May, 1928,—from May, 1928, to October, 1928.

Mr. DIBBLE.—What I am getting at is, the data from which you made this map, was that taken at the time that this accident occurred?

A. Yes, sir.

Mr. DIBBLE.—Which was July 13, 1928.

A. Yes, was taken from the records, by which that track was laid out at that time.

Mr. DIBBLE.—We have no objection.

(Map offered in evidence and marked Defendant's Exhibit "B.")

Mr. ROCKWOOD.—This is a pretty long map.

Q. Will you come down here and stand with the pointer, and we will hold this up for you. Now point out the main line; point out on that map the depot at Saco. A. There is the depot, there.

Q. Point out the main line track; point out the west head-block on the side-track at Saco. [206—166]

A. Here is the west head-block to the side-track; here is the main line going west.

Q. At that time was there a parallel track in operating condition? A. No, sir, there was not.

Q. Was there any construction work going on, along the north of the main line, from a point near this switch, west for a distance?

A. Yes, from a point here.

Q. When you say "a point here" you mean a point shortly west of Saco?

A. Yes, just west of the crossing at Saco, they

(Testimony of J. M. Hanley.)

were constructing a parallel track along the main line here to connect with the proposed branch line that went to Turner.

COURT.—Which is the main line?

A. This is the main line, right here.

Q. In the middle of the right of way?

A. Yes, this is the south right of way line; this is the north right of way line. This is the county road, and this the main line. We were constructing a parallel track to connect with the proposed track of the Turner line, which paralleled the main line, north side.

Q. What was the stage of the construction work on the date of July 13, 1928?

A. The grading for the track which was under construction was completed on July 12th, and there had been some track panels laid along the outside of that grade; by track panels they mean just two rails and ties attached together, but they were just unloaded with a derrick, not connected together, and not in proper alignment; they were set in [207—167] there at various angles, as close together as we could lay with the derrick; were not yet in operating condition. This switch was not constructed.

Q. The switch was not constructed?

A. No, sir, this switch was not constructed.

Q. Now this map, how far is it from the west head-block of the side-track, back to that bridge. Tell us in the nearest hundred feet if you can.

A. Twelve hundred fifty feet.

(Testimony of J. M. Hanley.)

Q. Just a second. Take that—take it from the head-block to the west end of the switch?

A. To the west end of that switch is seven hundred eight feet.

Q. Now unrolling the rest of this map for a ways—

JUROR.—How far is that head-block you speak of there, from the station?

A. This head-block from the station is—

JUROR.—The head-block you *are* referred to there.

A. Eight hundred feet, approximately eight.

JUROR.—I did not get the distance from the block to the switch.

A. Eight hundred forty-seven feet from that east end of the switch to the head-block; eight hundred forty-seven feet from the switch to the head-block.

Q. Unrolling this map, down here at the very extreme end of it is a curve.

A. Yes, a two-degree curve.

Q. From the point where the track begins to curve, up to the head-block on this map—this point where the track begins to curve is labeled Station 28437 plus 96. From that point up to the depot, is there any curvature in the track? [208—168]

A. None whatever.

Q. What is the distance from that point where the curvature begins, up to the head-block?

A. Well, it is approximately two miles. You want the exact distance?

(Testimony of J. M. Hanley.)

Q. The nearest thousand feet, is enough.

JUROR.—Where is the siding—

COURT.—We will get that in a minute.

A. Nine thousand four hundred twenty-five feet from the east end of the curve to the head-block of the passing track.

COURT.—One of the jurors wants to know where that passing track is.

A. That passing truck is the middle track right in here. This is the industry track; there is the passing track; here is the main line.

COURT.—Does that passing track leave the main line at the place you call the head-block?

A. Yes, might be easier if we called it the switch; we call it the head-block.

COURT.—How far does the passing track extend east?

A. Sixty-five hundred feet from here to the end of the passing track.

Q. This map does not show the end of the passing track.

A. No, sir. Tangent track practically four miles from the depot to the curve.

COURT.—Where was Mr. Shellenbarger found?

Mr. ROCKWOOD.—This man can't say; he was not there. This is just the man who drew the map.

Q. I want you to explain a little more about that new construction. You say new construction work, or new grade, with track [209—169] rails on it, began about here, between the station and the head-block of the passing switch. Is that right?

(Testimony of J. M. Hanley.)

A. Yes, sir, that is correct.

Q. And how far west did the building of the new and parallel construction extend?

A. To the point of this curve here, and then the Saco turn; turns north.

Q. In other words, the new construction work would parallel all the way down here to the point we refer to where the track begins to curve?

A. Yes, sir.

Q. And then new construction work bore off to the north? A. Turned north, yes.

Q. What kind of material was in that fill?

A. Soft sandy clay material that had been hauled in there.

Cross-examination.

(Questions by Mr. DIBBLE.)

Am I right in saying this is the east end of this map? A. This is correct.

Q. And only one line of railroad there?

A. Was at that time, in July 1928.

Q. Just one line running from here clear on to where the siding is?

A. Yes, sir, except here; there is a stockyard, and a stockyard track in there. But from this point, clear to here, was only one track at that time in operation.

Q. That track I am pointing to, this track?

A. That is the main line.

Q. These two lines are right of way lines?

A. Yes, sir. [210—170]

Q. And Saco is which side of the track as you go east? A. Saco is right here.

(Testimony of J. M. Hanley.)

Q. Would be on the left-hand side of the track, wouldn't it?

Mr. ROCKWOOD.—North of the track.

A. To the north of the track, yes.

Q. If the train were going east, Saco would be to the left? A. Yes, sir.

Q. This siding, is that where it starts?

A. Yes, sir.

Q. And goes off this way?

A. You see three tracks; here is one track, this is an industry track.

Mr. ROCKWOOD.—The most southerly track is the industry track?

A. Yes, the passing track is the middle track.

Q. The middle track? A. Yes, sir.

Q. And if a train were going east there, and wanted to take the siding to allow a train to go west, they would go on this middle track, right here where I am pointing. Would go in there?

A. Ordinarily they would.

Q. Were there two tracks there at the time, two passing tracks?

A. There is two passing tracks here. Here is the other passing track over here; but this is not a passing track, this is an industry track; this is not used for passing trains.

Q. If a train were going east and wants to take the siding, would go in on that middle track?

A. Yes, sir.

Q. They have to stop to take the siding, don't they? A. Yes, sir.

(Testimony of J. M. Hanley.)

Q. And do they have to turn a switch, or something? [211—171] A. Yes, sir.

Q. Would have to come to a complete stop right in here some place?

Mr. ROCKWOOD.—I don't think this witness can say.

COURT.—He is not an operator of trains.

Q. Now this construction work extended from where? I didn't quite get that. Just where was the work going on?

A. Right in here, paralleling this main track.

Q. Where? A. On that side.

Q. And was there a slow order in effect?

A. Yes, there was.

JUROR.—In a train coming from the west, as this one was, taking a siding, would the train be to the right of the main line, or to the left?

A. It would be to the right if it were on the track going east.

JUROR.—This industrial track was where?

A. That is still further south, the industrial track.

JUROR.—The main line was to the left of both of them?

A. On the north.

COURT.—Do you know anything about the signal—I call them signal posts, I don't know what you call them?

A. Yes, block signals.

COURT.—Well, the station where warning is given to approaching trains?

A. Yes, sir.

(Testimony of J. M. Hanley.)

COURT.—Where is that located here? On which side of the track?

A. On account of the construction the signal on this side had been removed. Ordinarily the signals would be a hundred and fifty [212—172] feet from this switch.

COURT.—Where was it, do you know, at that time?

A. It was a hundred fifty feet from this switch.

COURT.—On which side of the main track?

A. On the south side.

COURT.—Signals on the south side?

A. Would be one signal on each side; one for the west-bound train, one for the east-bound.

COURT.—The west-bound train, I have reference to.

A. The west-bound train signal would be north of the track.

COURT.—So that the crew of a train approaching the station—or if a station-master had orders for a train, he would put the signals advising the train, on the north side. Is that right? Is that the way it is arranged?

A. No, sir, it is controlled by automatic drop signals.

Mr. ROCKWOOD.—I think the Judge is asking about what we call an order board.

A. The order board would be right at the depot here, right in front of the depot, if you mean order board.

Mr. ROCKWOOD.—That is a manually operated board, operated from the inside of the depot.

(Testimony of J. M. Hanley.)

A. Yes, that is operated inside the depot.

COURT.—Is that on the north or the south side of the main track?

A. It could be either.

COURT.—In this instance, in 1928.

A. In 1928 it would be the north side of the main line, right in front of the depot, right on that platform of the depot.

COURT.—Just what do you mean by signal board?

A. A train order board that has two arms that the operator [213—173] indicates to the train crew whether he has orders for them.

COURT.—That is some kind of a—

A. It is a semaphore set up on iron posts, and two arms.

COURT.—That is what I was asking about when I referred to the signal board.

Q. (DIBBLE.) Where would the switch be located that the brakeman or whoever it is, would turn to get the train off the main line onto the side track?

A. What was that again?

Q. Where would the switch be located—where was it located, on which side of the track, the right-hand side as you went east, or the left-hand side?

A. Might be on either.

Q. What was it? A. It was on this side.

Q. On the right-hand side?

A. It would be on the south side of the track.

Q. If a train were coming this way, coming along the main line here towards the east, why the switch

(Testimony of J. M. Hanley.)

that they would turn to throw it from the main line onto this— A. Would be on the right side.

Q. Was on the right-hand side of the train?

A. Yes, sir.

Q. And that is where the brakeman, or whoever it was that would turn it, would get off. He would get off the right-hand side?

A. Not necessarily.

COURT.—He is not the operator; he only drew the map.

Mr. ROCKWOOD.—I object to that.

COURT.—Only the physical location.

Q. But that is where it was physically located at this time, [214—174] on the right-hand side?

A. Yes, sir.

Q. And this slow order. How far back did that extend?

A. I don't know, but that would be controlled by the train order; the train crew would have that.

Q. And if you ran clear down here—if the improvement ran clear down here as indicated, would be likely to cover down here?

COURT.—Ran down two miles, a mile and a half.

A. Yes, sir, just about that.

JUROR.—Were there lights on that switch at the west end?

A. Yes, sir.

JUROR.—That you used to operate that switching track?

A. Yes, sir.

JUROR.—Where was this light, this signal that was not being used because of the construction?

(Testimony of J. M. Hanley.)

A. That was on the north side of the track.

JUROR.—About where from that switch?

A. About a hundred fifty feet.

JUROR.—West?

A. West.

JUROR.—That had nothing to do with the main line at all.

A. No, sir, that would be for the train coming from the opposite way.

JUROR.—That signal was not being used?

A. No, sir, that was taken out.

JUROR.—On account of the construction?

A. Yes, sir.

Witness excused. [215—175]

TESTIMONY OF ROBERT H. SAWYER, FOR DEFENDANT.

ROBERT H. SAWYER, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Where do you live, Mr. Sawyer?

A. Portland, Oregon.

Q. And by whom are you employed?

A. Southern Pacific Railway.

Q. And what is your capacity with them?

A. Locomotive engineer.

Q. Were you a passenger on the Knights Templar train on the 13th of July, 1928? A. I was.

(Testimony of Robert H. Sawyer.)

Q. What was the first intimation you had that an accident had happened?

A. When the brakeman came through the train and said that a Sir Knight had fallen off.

Q. Speak up louder, please.

A. When the brakeman came through the train and said a Sir Knight had fallen off the train.

Q. Now, had that—when you heard the brakeman make that remark where were you in the train?

A. I was sitting in the observation-car, in the smoking compartment of the observation-car.

Q. Prior to the time that the brakeman made that remark, do you recall how the train was being operated?

A. Well, to my notion it was being operated in a very satisfactory [216—176] manner.

Q. Do you recall any jars, or lurches, or unusual swaying of the train at the time immediately before the brakeman made that remark? A. No, sir.

Q. After the brakeman made that remark, tell what you did?

A. Well, I immediately arose and started for the rear portion of the observation-car to get off and see if I could go back and probably find Mr. Shellenbarger. By the time I got to the rear part of the car they had made one stop and immediately gone, and I pulled the whistle-cord to stop the train again so that I could get off.

Q. You pulled a signal? A. Yes, sir.

Q. After you blew the signal what happened to the operation of the train?

A. Well, there was quite a sudden jar then, be-

(Testimony of Robert H. Sawyer.)

cause in moving only about a car-length, you will naturally get slack taken out of your train, and when you make the application of the brake, the slack will naturally run in on the rear end before the air sets on it.

Q. Now, tell us so it will be perfectly clear, Mr. Sawyer, just what you remember as to the movement of the train from the moment that the brakeman said that a Sir Knight had fallen from the train until it stopped after your signal; what did the train do? How fast did it go? Was the motion continuous or what did it do? Do you get my question?

A. Well, I believe, I won't be positive, but I believe it come to a momentary stop, and then he started again. That was the reason I blew the whistle signal, because I knowed [217—177] I couldn't get off with it moving, on account of being dark. I didn't want to take a chance of probably getting hurt.

Q. After it came to a stop, after your signal did you get off the train? A. Yes, sir.

Q. What was the position of the train at that time, was it on the main line, or was it on the side-track? A. It was on the main line.

Q. Where did you go then?

A. I immediately started back along the main line to where Mr. Shellenbarger fell off.

Q. Did you get back to where he was hurt?

A. Yes, sir.

Q. Did you observe his condition at that time?

A. Well, there was—Mr. Stewart was holding

(Testimony of Robert H. Sawyer.)

him; I believe had his arms under his shoulders and holding him up.

Mr. ROCKWOOD.—I guess there is not dispute about that. They all said he was unconscious; I don't want to waste the time of the court going over that again.

Q. After you had been back there *do* you back up to the train?

A. I came back on the automobile. I helped carry Mr. Shellenbarger across the drain ditch, along where the new construction work had been going on, and over the fence and helped put him in the automobile.

Q. When you got back to the train, where was the passenger train at that time?

A. It was on the siding at Saco.

Q. Where with respect to the station at Saco?

A. Well, I should judge the head end stopped some place near the depot. I wouldn't be positive about that. [218—178]

Q. It was up there at the depot? A. Yes, sir.

Q. From the time you got off the train until the time you got back on it at Saco, do you know anything about what happened to the operation of the train itself? A. No, sir.

Q. Do you know anything about the condition of the vestibule at the time this accident is said to have happened? A. No, sir, I don't.

Cross-examination.

(Questions by Mr. DIBBLE.)

You were employed,—you are employed by the

(Testimony of Robert H. Sawyer.)

Southern Pacific Company at this time, are you?

As a locomotive engineer?

A. No, sir, back-firing an engine at present.

Q. But you have been an engineer?

A. Yes, sir.

Q. How long have you been in the service of the Southern Pacific Company?

A. Almost eighteen years.

Q. And you were riding in the smoking compartment of the observation-car? A. Yes, sir.

Q. And was that towards the front of the observation-car? A. It is about the middle of the car.

Q. It is about the middle? A. Yes, sir.

Q. And were you sitting down or standing up?

A. Sitting down.

Q. And you were sitting down at the time the brakeman came through? [219—179]

A. Sitting down.

Q. And you were sitting down at the time the brakeman came through? A. Yes, sir.

Q. And you had been sitting down all the time as you rode along there before that, had you?

A. Well, I had been in the observation-car, I think, probably thirty or forty minutes.

Q. And had you been sitting all that time?

A. Yes, sir.

Q. Sitting down there for half an hour?

A. Yes, sir.

Q. Before the brakeman came through there?

A. Yes, sir.

(Testimony of Robert H. Sawyer.)

Q. What were you during that time doing,—do you remember?

A. We were just having a friendly chat there amongst ourselves; were some seven or eight of us sitting there.

Q. You were not paying any particular attention to the movement of the train, were you, at that time? A. No, sir, none of us were.

Q. There was no reason why you should be doing so? A. No, sir.

Q. You were riding along there with some of your friends? A. Yes, sir.

Q. In the smoking department, and you were not keeping any particular lookout to see just how the train was being operated, were you? A. No, sir.

Q. Now, you say that the brakeman said that a Sir Knight had fallen from the train. That is what he said, didn't he? [220—180] A. Yes, sir.

Q. You are sure about that? A. Sir?

Q. He didn't say he had walked off the train, did he?

A. He said that a Sir Knight had fallen off the train.

Q. Fallen off the train. Did he seem to be scared, excited? A. Well, he naturally would be.

Q. I am not asking you if he wouldn't; he was excited, wasn't he?

A. He naturally would be, in an accident like that.

Q. Just answer whether he was or not. And you

(Testimony of Robert H. Sawyer.)

are sure he said he fell from the train, he had fallen off the train?

A. I am positive that is what he said.

Q. Now, then, how fast would you say the train was going along there before the brakeman came in and said a Sir Knight had fallen off the train?

A. Well, that would be pretty hard to answer, sitting in the smoking department of the car.

Q. Well, you are an engineer, and you have been driving locomotives, haven't you? A. Yes, sir.

Q. You sit down when driving them, don't you?

A. In a locomotive cab it is altogether different than sitting in a passenger-car.

Q. That is probably true; but you could give us some idea, couldn't you, how fast the train was going before the brakeman came in and said a Sir Knight had fallen off?

A. They were slowing, so I don't know just exactly what speed they were making along there; previous to that I should judge [221—181] they had been making about thirty-five or forty miles an hour.

Q. Going right along? A. Yes, sir.

Q. Do you know anything about their having to make this siding? A. No, sir.

Q. You don't know anything about what the train's orders were? A. No, sir.

Q. And you were not paying much attention, then, to the movement of the train, were you?

A. No, sir.

Q. You weren't paying much attention to what

(Testimony of Robert H. Sawyer.)

the speed was, or the lurching, or jarring up, or anything of that kind? A. No, sir.

Q. No reason why you should? A. No, sir.

Q. And all you can say is, as you were sitting there before the brakeman came in and said a man had fallen from the train, you hadn't noticed anything? A. No, sir.

Q. And you were not paying any attention along this line at all? A. No, sir.

Q. And did you—when the brakeman came through the observation-car did he go to the back end then and get off the train?

A. Yes, he did.

Q. And when he got off was the train in motion, or had it stopped?

A. That I couldn't say; he got off before I did.

Q. The train was going when he got off, wasn't it?

COURT.—He said he couldn't say. [222—182]

Q. Couldn't say. Do you know when Mr. Stewart got off? A. No, sir, I don't.

Q. You don't know whether—do you know when Mr. Cornell got off? A. I do not.

Q. Was the train still or moving when you got off? A. Was standing still.

Q. Whereabouts was it? Can you show us on the map where the train was when you got off?

A. Well, I don't know as I could tell you exactly where it was.

Q. How far from Saco was it?

(Testimony of Robert H. Sawyer.)

A. Well, I don't know as I could tell you that, because it was dark.

Q. Had it gotten up to the station yet?

A. No, sir.

Q. Was it on the main line when you got off?

A. Yes, sir.

Q. Or had it taken the siding?

A. It was on the main line.

Q. It was on the main line? A. Yes, sir.

Q. And how far was that place where you got off, from the place where the brakeman came in and said a man had fallen off?

A. Well, I don't know, because they went—how many feet they did go after he came through the car until he got off the train.

Q. And about how far do you think it was? What I am trying to get at is, how far do you think the train traveled after the brakeman said that a man had fallen from the train? How far did the train travel from that time until it stopped and you got off it?

A. I wouldn't say that we traveled over an eighth of a mile. [223—183]

Q. An eighth of a mile. And is that the stop that you spoke of as a momentary stop, which you say you have a recollection of? A. Yes, sir.

Q. And that momentary stop, if there was one, occurred at least an eighth of a mile from the place where the brakeman came in and said a man had fallen from the train? A. Yes, sir.

(Testimony of Robert H. Sawyer.)

Q. And then was the train moved up the track further then after that to the siding?

A. Yes, sir.

Q. I suppose you were there when it was moved?

A. No, sir, I wasn't there when it was moved.

Q. You went back to where this man was?

A. Yes, sir.

Q. Did you assist in carrying him to the automobile? A. I did.

Q. Did you notice his head?

A. No, sir, I did not; it was dark, and the fellow that had the lantern went ahead of us.

Q. Did you know him? Did you know Mr. Shellenbarger?

A. I had known of him for a good many years.

Q. Were you personally acquainted with him at the time? A. No, sir, I was not.

Q. Did you know at the time you saw the man lying there, that it was this man? A. Yes, sir.

Q. You knew it was this man?

A. Yes, sir. [224—184]

Q. And he was unconscious, wasn't he, when you saw him? A. He was.

Q. And you rode with him in the automobile to Saco? A. Yes.

Q. Then I understand he was put on the train, and carried by the train on up to Glasgow. How far is Glasgow up from Saco? Do you know how far about it is? A. I don't know.

(Testimony of John Dannell.)

Q. It is not a great ways on up there, is it?

A. That I couldn't say.

Witness excused. [225—185]

TESTIMONY OF JOHN DANNELL, FOR DEFENDANT.

JOHN DANNELL, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Mr. Dannell, by whom are you employed?

A. Great Northern Railway.

Q. And what is your business with the Great Northern? A. Locomotive engineer.

Q. Were you the engineer in this Knight Templar special train on July 13, 1928, near Saco?

A. I was.

Q. Now, first, on the track west of Saco, for a stretch of three or four miles—I am not trying to fix it now by distance—but for that stretch west of Saco there was a slow order in effect at that time?

A. There was, for about two miles west—from Saco west.

Q. Now, do you have a recollection at this time of exactly what the terms of that slow order were?

A. No, I am not positive, but it seems to me it

(Testimony of John Dannell.)

was twenty or twenty-five miles an hour; it seems to me it was twenty, though.

Q. For passenger trains? A. Yes, sir.

Q. Beginning at a point about two miles west of Saco, near the stockyards. You are familiar with that location? A. Yes, sir.

Q. The map shows that is a tangent track. From there on in [226—186] tell us what you recall as to the operation of your locomotive and the speed at which you were going, and the signals, and the stops that you made.

A. Well, at the stockyards I had the train slowed down to about twenty or twenty-five miles an hour, and was proceeding at that rate of speed; when I came to within—just about a mile from Saco, I was pulled down by the signal cord, and I proceeded to stop, but I didn't have—it was to stop on one signal, but I didn't make emergency application; just made a gradual stop, and got down to just a little bit more than a quarter of a mile from the switch; that is, I was with the engine right on this bridge when I made this first stop.

Q. After you made that first stop then what did you do?

A. We waited until the brakeman showed up, the head brakeman, but he couldn't get up to the engine on account of this bridge, and we couldn't see anything on the left side that I know of; I don't remember whether the brakeman could see anything from—the fireman could see anybody on

(Testimony of John Dannell.)

the left side, or not; but I saw nothing in sight on my side; was about a minute, but we proceeded again and I not much more than got the train started to move when I was pulled down again, that is, that whistle signal, and I proceeded to stop again; but the train going at a slow speed, I probably stopped a little bit hard the second stop, because we only went about, I would say, two hundred feet on the second stop—when we made the second stop; and then the brakeman came up to the engine, that is, our head brakeman, and got on the pilot of the engine, and he says—

Mr. DIBBLE.—Just a moment; I object to what he said. [227—187]

Q. Don't tell what he said; just tell what you did.

A. When he got on the head end of the engine we proceeded again down to the station to head in, where we had to meet with No. 3, which was at this time about a quarter of a mile to the switch, and he threw the switch—

Q. Who threw the switch?

A. The brakeman threw the switch, got up on the engine, and while we was pulling in the clear I told him the whistle signal was blowing continuously, I think there is something wrong with it. So he said he would look over the signal line when we got in the clear; and he starts to walk back; and shortly after that someone came up and let us know there was a man fell overboard before we had stopped the first time.

Q. Up to that point—until you were on the pass-

(Testimony of John Dannell.)

ing track at Saco you had no information that a man had fallen off? A. No, sir.

Q. When you got just to the head-block there of the west switch, you stopped; was that an operating stop? How was the switch set there?

A. It was lined up to the main line, normal position, being set for the main line.

Q. That had to be opened up before you could go on the side-track? A. Yes, sir.

Q. Where did your engine stop after you got on this side-track?

A. We were with the engine about a hundred fifty to two hundred feet east of the station. [228—188]

Cross-examination.

(Questions by Mr. DIBBLE.)

How long, Mr. Dannell, have you been employed by the Great Northern Railroad?

A. Twenty-four years.

Q. And you live where? A. Havre, Montana.

Q. This slow order that you speak of, that existed, was that an order in writing? A. Yes, sir.

Q. And have you got a copy of it? A. No, sir.

Q. Has counsel got a copy of it?

A. I don't know.

Mr. ROCKWOOD.—No, I haven't. I wish I had; I overlooked that.

Q. Where did you get those orders?

A. From the dispatcher's office.

Q. Is that given to you before you start out on the run? A. Yes, sir.

(Testimony of John Dannell.)

Q. And you have that right with you, then?

A. Yes, sir.

Q. In the cab of the locomotive? A. Yes, sir.

Q. And you say that this slow order required you to go how slow through this construction work?

A. I don't remember positively now; it has been two years ago; but it seems to me between twenty to twenty-five miles an hour; either twenty or twenty-five.

Q. Is that the customary speed when going through construction work? [229—189]

A. Yes, sir.

Q. Let me ask you: Is the Great Northern Railroad—was it at that time operated under standard train rules? A. Yes, sir.

Q. That governed the Hill lines? A. Yes, sir.

Q. In other words, the Spokane, Portland & Seattle—

Mr. ROCKWOOD.—Just a moment; this man doesn't know the S. P. & S. rules.

Mr. DIBBLE.—This is cross-examination; I think he does; he can say.

Q. You have been an engineer for twenty-five years. Did you ever work for the S. P. & S.?

A. Engineer since 1913, seventeen years.

Q. But you are familiar with the train rules under which the Spokane, Portland & Seattle Railway operates? That is one of the Hill lines.

A. To this extent, that it is standard rules; but we have a Great Northern book of rules for the

(Testimony of John Dannell.)

Great Northern, and the S. P. & S. for the S. P. & S.

Q. You have the same standard rules that apply to the S. P. & S. and the Great Northern. That is true, isn't it?

A. Practically the same, I suppose; I haven't looked over the S. P. & S. rule book.

Q. But your understanding is that all of the Hill lines have the same standard operating rules?

A. I think so.

Q. And this slow order that you had there, could you tell from this map—could you show the jury here where that would be [230—190] that you would be required to slow down to twenty or twenty-five? A. Yes, sir.

Q. I wish you would do that.

COURT.—He said, about two miles back of the depot; he said two miles west of the depot; that would take it back to the curve, according to the testimony?

A. About at the stockyard, the stockyard switch.

Q. That is all right. That is two miles?

A. Well, approximately two miles.

Q. Two miles west of the depot then you should have the train slowed down to twenty or twenty-five miles an hour? A. Yes, sir.

Q. And then you should continue that two miles at that same speed?

A. Just about that, yes, as near as I could make that speed.

Q. Up to the end of the construction work?

(Testimony of John Dannell.)

A. Yes, sir.

Q. How fast were you going with the train before you came to that two-mile point?

A. Oh, I was going pretty—around forty-five or fifty miles an hour.

Q. How much?

A. Between forty-five and fifty miles an hour.

Q. Between forty-five and fifty. When did you know that you had to make this siding to allow the other train to go by?

A. We had a straight meet, so we didn't have any positive time to get there; but of course I figured on getting there so as not to lay them out any more than would be if had been on time.

Q. Didn't you have an order to go into the hole, as you call it? [231—191] A. Yes, sir.

Q. When did you receive that order to go into the hole at Saco?

A. At Malta. We left there about 9:55 I think it was.

Q. Do you remember—do you actually remember now—over two years since the accident occurred, you actually remember the slowing of the train down for the purpose of complying with that slow order? A. Yes, sir.

Q. Or do you just say that because there was an order to that effect? You remember you did slow it down? A. Yes, sir.

Q. And where did you slow it down?

A. So as to have it at that speed about the east switch of the stockyard.

(Testimony of John Dannel.)

Q. About two miles west of Saco?

A. Approximately so, yes.

Q. And then you said you got a signal. What kind of a signal was that you got? What kind of a stopping signal was it you got?

A. Two sounds of the air signal.

Q. Where was the train, would you say, at the time you got that signal?

A. About a mile from the station switch.

Q. About a mile from it? A. Yes, sir.

Q. So you were just about in the middle of this construction work? A. Almost so.

COURT.—That almost follows as a matter of fact, if it was two miles, and he was in the middle of it. [232—192]

Q. So that is a signal, Mr. Dannel, to stop the train? A. Yes, sir.

Q. For an emergency stop? A. Yes, sir.

Q. It wasn't an emergency stop, was it?

A. No.

Q. It wasn't the kind of a signal that would be given if a man had been thrown overboard?

COURT.—How does he know what kind of a signal would be given if a man were thrown overboard.

Mr. DIBBLE.—I don't know, your Honor.

COURT.—I know; but you say that is not the kind of a signal given if a man were thrown overboard.

Mr. ROCKWOOD.—I think that is immaterial, irrelevant and incompetent.

(Testimony of John Dannel.)

COURT.—I don't think any special signal in existence if a man were thrown overboard from a train.

Mr. DIBBLE.—I should think there would be; I think it would be a very humanitarian thing to have.

Q. I will ask you if there is any signal to stop the train when someone has been thrown from the platform? A. No, sir.

Q. Don't you have any kind of an emergency signal? For a matter of that kind?

A. No, sir, not that I know of; I know of none.

Q. And this signal you say you got one mile from Saco, what was that signal for you to do?

A. Stop at once.

Q. Stop at once? A. Yes, sir.

Q. How many cars were in that train?

A. Ten. [233—193]

Q. Including the engine?

A. No, ten cars and the engine.

Q. At the time you got that signal how fast were you going?

A. About between twenty and twenty-five; I don't remember exactly, but between that; twenty or twenty-five miles an hour.

Q. That was a mile west of Saco. How far were you from Saco when you brought the train to a stop in response to that signal?

A. It traveled more than a quarter of a mile. I was with the engine right on this bridge here that was mentioned.

(Testimony of John Dannell.)

Q. Did you stop the train as soon as you could.

A. Without making an emergency application, yes. Well not—I want to say I wasn't going to make a hard stop, not knowing there was any occasion for that; just a gradual good stop.

Q. How far did it take you to stop the train going twenty miles an hour, or twenty-five, what distance did that take?

A. Well, it was—I have no idea; I used a little over half a mile to make a stop, anyway. As I say, I didn't make an emergency stop, just a gradual heavy stop.

Q. You think it took you half a mile to make the stop? A. Yes, sir.

Q. Wouldn't that indicate, Mr. Dannell, you were going at a faster speed than twenty or twenty-five miles an hour? A. No, sir.

Q. Does it take half a mile to stop a train of ten cars and an engine?

A. No, sir, not if make a heavy stop.

Q. In what distance—

A. It would if going fifty miles an hour, but at twenty miles an hour it wouldn't take no heavy application to use half a mile to stop in. [234—194]

Q. It would take half a mile to stop if going at fifty miles an hour?

A. That would make a pretty hard stop, to stop in half a mile; awful hard stop.

Q. If going forty-five miles an hour, what would it take? Just about half a mile, wouldn't it?

(Testimony of John Dannell.)

A. Just take pretty hard stop, yes.

Q. Now, then, if going twenty to twenty-five miles an hour, what would be the shortest distance you could stop the train in?

A. Well, sir, you can stop awful quick.

Q. About how—

A. At twenty miles speed I should say in—well, I have—I couldn't tell you exactly, but I imagine a fellow could stop in about five hundred feet.

Q. About five hundred feet. If a train were going along at about twenty miles an hour, could stop in about five hundred feet, and you have no independent recollection at this time of just how fast the train was going through this construction work, have you?

A. About twenty or twenty-five miles an hour.

Q. But that is just because you had an order to go that fast? A. Yes, sir.

Q. If you had been a little behind you might have been going faster than that, might you not?

A. No, sir.

Q. Do you recall whether you were on time or not?

A. We had no schedule. All we had was a straight-meet with No. 3 at Saco.

Q. Were you sufficiently on time to make this siding to allow the other train to go? [235—195]

A. Well, we didn't have any too much time, for them to leave on time; but at the same time we could see them coming four or five miles; five miles; and no sight of their headlight, or anything.

(Testimony of John Dannell.)

COURT.—Is No. 3 scheduled to stop at Saco?

A. Yes, sir, they are.

Q. And were running close to time to get into the siding to let this other train pass? The time was getting short?

A. Was getting close to their time, yes.

Q. And to make this siding of course you have to throw a switch here? A. Yes, sir.

Q. And have to make an absolute stop there, to get in there? A. Yes, sir.

Q. And that switch is on the right-hand side of the track, is it, as you look towards Saco?

A. Yes, sir.

Q. And going east? A. Yes, sir.

Q. And would that be operated by the brakeman?

A. Yes, sir.

Q. Who would be on the rear of the train?

A. No, the brakeman at the head end of the train.

Q. Would be a different brakeman who would operate that switch? A. Two different, yes.

Q. Would the brakeman be on the head end who would take care of that?

A. Heading in, and the hind man if the hind end was going in.

Q. Had you been late on the trip anywhere? Were you late in getting out of Spokane?

A. No, I don't think so; was no schedule to the train, as far [236—196] as I know.

COURT.—No what?

A. No schedule to the train, as far as I know; just running extra.

(Testimony of John Dannell.)

Redirect Examination.

(Questions by Mr. ROCKWOOD.)

Were you the engineer on the train out of Spokane?

A. Yes—no, no, not out of Spokane; out of Havre.

Q. You went out of Havre? A. Yes, sir.

Q. I think it is quite clear the head brakeman would operate the switch on entering the passing track, is that right?

A. The head brakeman; yes.

Q. And who would operate the switch after you were in clear on the passing track?

A. The rear brakeman.

Q. Now, do I understand that when you gave these figures as to the distance in which a train could be stopped at various speeds, you said it could be—would have difficulty in stopping in half a mile at fifty miles an hour; that means what kind of a stop would be required to do that?

A. The heaviest service application without going into emergency.

Q. How would you describe the application of air which you made to stop the train when you got the first signal on this occasion?

A. Oh, just made about eight-pound reduction.

Q. Is that a light application, or a heavy application?

A. It is a light application. With the brake equipment we got now, it is about as light application as we can make and apply the brakes. [237—197]

(Testimony of John Dannell.)

Recross-examination.

(Questions by Mr. DIBBLE.)

And that light application would not jar the train so as to throw anybody? A. Yes.

Q. That light application would not? A. No.

Q. And you made a very light application at that time, and would not be enough to throw a man, or anything of that sort? A. No.

JUROR.—You said the switch was on the right-hand side of the track?

A. Yes, sir.

JUROR.—Which side would he be apt to open the door to close the switch?

A. We have positive instructions to go out the opposite side of the switch, and they always do it; so he was getting off the left side.

JUROR.—How far away was the next passing track west of Saco?

A. I think five miles; somewhere approximately five miles.

JUROR.—How much time did you have from there in to Saco?

A. Well, we didn't have any specified time; were just running extra.

JUROR.—I know; but you knew what time you passed that switch, don't you?

A. No, I don't, but I know we made a stop at Malta.

JUROR.—Did you have any slow orders beyond the stockyards west? [238—198]

A. No, sir.

(Testimony of John Dannell.)

JUROR.—Was that track level, or any grades?

A. Well, about four per cent; that is practically level.

JUROR.—Now, either you or one of the preceding witnesses spoke about a slack. I want to know if the Great Northern has a rule that you work steam when you are going to stop, until the stop is completed?

A. Why, yes, we use steam; not a wide open throttle, but we use steam.

JUROR.—The purpose of that is to avoid any shock?

A. Yes, sir.

JUROR.—Or jarring.

A. Yes, sir.

JUROR.—And were you working steam each time when you got the signal to stop?

A. Yes, sir.

JUROR.—Then under that theory there shouldn't have been any jolt to the train, should there?

A. No, sir.

Witness excused.

Recess until 2 P. M. [239—199]

Portland, Ore., Friday, Dec. 12, 1930, 2 P. M.

TESTIMONY OF ROSWELL A. C. BENNETT,
FOR DEFENDANT.

ROSWELL A. C. BENNETT, a witness called by the defendant, being first duly sworn, testified as follows:

(Testimony of Roswell A. C. Bennett.)

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Mr. Bennett, you live in the city of Portland?

A. Yes, sir.

Q. What is your business?

A. Assistant Auditor of the United States National Bank.

Q. Were you a passenger on the Knight Templar special train in the month of July, 1928, when Mr. Shellenbarger was hurt? A. Yes, sir, I was.

Q. Where were you in the train when you received the first notice that you had, that anything had happened to Mr. Shellenbargaer?

In the smoking compartment of the observation-car.

Q. What was the first notice you had that something had happened?

A. When the rear brakeman, I believe we call it, put his head through the door and into the smoking compartment, and said that one of the Sir Knights had just fallen off the train.

Q. Now, prior to that time, within the next three or four, or five minutes prior to that time, had you noticed anything about the operation of the train, in the nature of lurches, or jerks, or any swaying out of the ordinary?

A. The only thing that I noticed was the fact that the train had commenced to slow down just a little previous to that. [240—200]

Q. Do you know how much previous to that it was?

(Testimony of Roswell A. C. Bennett.)

A. It is difficult to judge time. It might have been a couple of minutes.

Q. After the brakeman made that statement, what did you do?

A. Well, it sort of stunned me for a moment. Then I got up and went out of the smoking compartment and towards the rear of that observation-car, and the train in the meantime had slowed down to such a point that a number of men had been dropping off and starting back up the track, and I was one of the last ones that went over the rear end and on up the track in search of Mr. Shellenbarger's body.

Q. Now, when you got off was the train still moving, or was it standing still?

A. It was still moving.

Q. How did you get off, do you recall? Did you climb over the rail, or go on some steps, or did you go off?

A. No, I just climbed over the tail end of it, was no steps open there. I just went out over that rail and down onto the right of way.

Q. How far back up the track did you go? Did you go back all the way to Mr. Shellenbarger?

A. No, I didn't quite reach the place.

Q. Then after you got back as far as you did go, what did you do?

A. I met some one of the men who was coming back towards the train, in order to notify the train that they had found Mr. Shellenbarger, and to return for him; and he stated that he was all in and

(Testimony of Roswell A. C. Bennett.)

couldn't go any further, and I volunteered to take the message back; so I immediately turned around and went back to the train.

Q. Did you walk up the track the whole distance to the train then? [241—201]

A. I ran and walked; yes.

Q. When you got back to the train where was the train?

A. The train had taken a siding there at what proved to be Saco, Montana.

Cross-examination.

(Questions by Mr. DIBBLE.)

Were you sitting down in the smoking compartment, or were you standing up?

A. I was sitting down.

Q. And about how long had you been seated there in the compartment before the brakeman came through and said that a Sir Knight had fallen?

A. From what time are you figuring?

Q. About how long before that had you been sitting there in the compartment?

A. Oh, I might have been there for half an hour or more, I couldn't say.

Q. And you were not paying any particular attention as to the movement of the train as you were riding along there, were you?

A. No, not in particular, except I did observe the fact that there had been a decided slowing up for two or three minutes prior to that.

Q. But you were just riding along there like an ordinary passenger might, and not paying any more

(Testimony of Roswell A. C. Bennett.)

observation about the movement of the train, than any other passenger would?

A. I wasn't paying any particular attention to it; I didn't have my mind on it in particular. I did not anticipate what was coming up.

Q. No, you had no reason to believe there was going to be any [242—202] accident, and you were not paying any attention to the movement of the train particularly, were you? A. No, sir.

Q. Are you clear in your mind as to what the brakeman said when he came and stuck his head in the compartment?

A. I sure am, on that point.

Q. And you are sure that he said that the Sir Knight had just fallen from the train?

A. Yes, one of the Sir Knights has just fallen off the train. That is the exact words, as I recall it.

Q. Those were the exact words?

A. I recall that very distinctly.

Q. He did not say a Sir Knight had walked off the train, or stepped off the train, did he?

Mr. ROCKWOOD.—I object to that; the witness has stated those were his exact words.

Mr. DIBBLE.—I believe on cross-examination I would have a right to go into that, after what you allege in your answer, as I understand.

COURT.—The brakeman said a Sir Knight had fallen off the train?

A. That was the exact words. He didn't say walked off, at all.

Q. Didn't say he walked or stepped off the train?

(Testimony of Roswell A. C. Bennett.)

A. No, just fallen off.

Q. And about how fast was the train moving, do you think, when you got off of it?

A. I couldn't tell you that.

Q. Well, about. Couldn't you tell?

A. Might have been five miles an hour, six, or seven. I haven't [243—203] the least idea. It had slowed down very decidedly by that time, because the air had been pulled on the engineer, and of course it had slowed down.

Q. About how long after the brakeman made this statement was it that you got off the train?

A. Why, things were moving so fast I couldn't tell; it might *have a* minute, two minutes, might have been three-quarters of a minute. They were going out there like a band of sheep, over the back of that train, to get back there.

Q. Had the brakeman gotten off before you?

A. Oh, yes, he just went right on and disappeared towards the rear end of the train as soon as he made that announcement.

Q. He wasn't the first one that got off, was he?

A. I wasn't there at the moment he got off, I can't say.

Q. And about how far back did you walk, do you think?

A. Well, it was dark, and I couldn't see; it might have been five hundred feet, or it may have been an eighth of a mile, I haven't the least idea.

Witness excused. [244—204]

TESTIMONY OF RICHARD W. CHALLANDER, FOR DEFENDANT.

RICHARD W. CHALLANDER, a witness called in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Where do you live Mr. Challander?

A. Havre, Montana.

Q. And who do you work for?

A. Great Northern Railway Company.

Q. What is your business with the Great Northern? A. Locomotive engineer and fireman.

Q. Were you a member of the train crew on this Knight Templar Special that was in Montana, near Saco, on the 13th of July, 1928?

A. As to the date, I couldn't say, but I was on that particular train, yes.

Q. What was your business on the train?

A. Fireman.

Q. You were fireman? A. Yes, sir.

Q. In the locomotive? A. Yes, sir.

Q. Now, are you familiar with the stretch of track from the stockyard west of Saco, down to the station at Saco? A. Yes, sir.

Q. On this particular night, when this Knight Templar train was being operated, did you make—did the locomotive make—did the train make any stops between the stockyard and the station at Saco?

A. Yes, sir. [245—205]

(Testimony of Richard W. Challander.)

Q. Now, tell us what you heard in the locomotive and what the train did with respect to stops at the time the first stop was made, due to the fact that a communication whistle was sounded from someone on the train signalling?

A. The engineer to stop.

Q. What kind of a signal is that?

A. Two blasts of the air whistle.

Q. In your position as fireman, could you hear these two blasts? A. Oh, yes.

Q. When—what did the train do when these two blasts were heard? What did the engineer do with the train?

A. He made the usual reduction to stop the train.

Q. When you say “reduction” you mean manipulated the air brakes? A. Yes, sir.

Q. And when he stopped the train there where was the locomotive at?

A. You mean as to distance?

Q. At any point on the track. Can you identify its location by any objects on the track?

A. Well, we were possibly a mile from the Saco station, a mile and a quarter probably; somewhere in there.

Q. Are you familiar with a bridge over Beaver Creek? A. Yes, sir.

Q. Where was it stopped with respect to that bridge, do you remember?

A. The stop was made west of the bridge.

Q. When the train stopped what happened next?

A. I observed—that is, I looked back for sig-

(Testimony of Richard W. Challander.)

nals. There were no signals given on the left side of the train. I informed [246—206] the engineer to that effect.

Q. Then what did he do?

A. He also repeated that there were no signals on his side, and we proceeded ahead.

Q. What happened then?

A. There was a series of short blasts on the air-whistle.

Q. What did the engineer do then?

A. Made another stop.

Q. How far had you gone between the first stop and the second stop, do you remember?

A. A very short distance, possibly two or three coach lengths, some such matter.

Q. Then after that second stop what was the next movement of the train?

A. We proceeded—that is, the train was started ahead for the purpose of going in on the passing track.

Q. And were there any further stops or changes in operation of the train between that second stop and going on the passing track?

A. Well, sir, I don't recall whether we stopped at the switch, or slowly went through it when we came. I don't remember whether we were going slow enough that we hadn't to stop for the brakeman to get the switch or whether we were going at a slow speed.

Q. Then you headed in on the passing track?

A. Yes, sir.

(Testimony of Richard W. Challander.)

Q. Where was the train stopped?

A. In the clear of the main line.

Q. You didn't see this accident?

A. No, sir. [247—207]

Q. When did you first hear that an accident had happened?

A. After we were in the clear on the passing track.

Q. Did you leave your locomotive at any time?

A. I did.

Q. Where did you go?

A. Just back to the first car, I believe it was.

Q. Then what did you do?

A. I went back to the locomotive.

Q. And the train left town some time later?

A. Yes, sir, some time later.

Cross-examination.

(Questions by Mr. DIBBLE.)

You are still in the employ of the Great Northern Railway, are you? A. Yes, sir.

Q. How long have you been in the employ of the company? A. Since 1916.

Q. And did you always work as fireman?

A. No, sir.

Q. Have worked also as an engineer?

A. Yes, sir.

Q. And how long did you work as an engineer?

A. Since 1924.

Q. And in the ordinary operation of the train does the fireman ride on the left-hand side of the cab? A. It is his place, yes, sir.

(Testimony of Richard W. Challander.)

Q. That is where you were riding?

A. Yes, sir.

Q. And did the Great Northern Railway Company operate under what are known as standard regulations for the operation of trains? [248—208]

A. We are operating under our regular rules; yes, sir.

Q. Under the standard rules? A. Yes, sir.

Q. They have a book of rules for the different roads, don't they?

A. Well, I don't understand your question, sir.

Q. Doesn't the company issue a book of rules, or regulations, as to flagging and different details of operation?

A. They give us our rules; yes, sir.

Q. They are in the form of a printed book, are they not? A. Yes, sir.

Q. Those are what are known as standard operation? A. Standard operating rules; yes, sir.

Q. They apply, for instance, to all the Hill Lines, they have the same regulations, don't they?

A. I believe they do; there is a book of rules issued for the Great Northern, and one for the S. P. and one for the U. P., whatever road it might be.

Q. But the standard rules are all the same in all the books?

A. Well, I haven't read the other railroad books; I couldn't tell you that. But apparently from the word "standard" they would be.

Q. If you were shown the rule of the S. P. & S., for instance, in regard to flagging, you could tell

(Testimony of Richard W. Challander.)

if that is the same regulation as the Great Northern, couldn't you?

A. I believe I could, yes, sir.

Q. And as far as you know, the general rules are the same? A. As far as I know, yes, sir.

Q. I will ask you, Mr. Challander, to look at this book here, which is labeled "Spokane, Portland & Seattle Railway." That [249—209] is a part of the Hill System, of course?

A. I don't know.

Q. You don't know that? A. No, sir.

Q. There is a rule here; just read that, if you will. The one at the bottom of the page.

Mr. ROCKWOOD.—May I see what rule you are referring to? (Taking book.) It is not the same as the Great Northern rule, I can say that. I have the Great Northern book here, but that is not as the published Great Northern rule. Do you want the Great Northern rule book?

Mr. DIBBLE.—Yes, I would like to have them both.

COURT.—It was not on the S. P. & S. line, it was on the Great Northern Railway.

Mr. DIBBLE.—I will take the Great Northern; I have read the two rules.

COURT.—Yes, take the Great Northern.

Q. I will ask you then to refer to this Great Northern book, Mr. Challander, and read that Section 836 there. You need not read it out loud, just read that over to yourself, then I may compare them.

(Testimony of Richard W. Challander.)

A. You want me to read this to the jury, sir.

Q. No, no, just read it over to yourself, and satisfy yourself that was the rule. I will ask you to read that, and state whether or not that rule there was in effect on the 13th of July, 1928, at the time this accident occurred?

Mr. ROCKWOOD.—I will stipulate it was.

A. This book was in operation—this date in this book shows it was in 1921.

Mr. ROCKWOOD.—That book of rules was still effective. [250—210]

A. This was still effective in 1928.

Mr. DIBBLE.—We will offer that rule in evidence.

Mr. ROCKWOOD.—I have no objection to it being read, but I do not want the book out of my possession.

Mr. DIBBLE.—“The proper position for the rear passenger brakeman, while his train is in motion, is in the last car of the train, regardless of whether it is an observation, sleeping or private car, but during daylight hours he should get off the head end of such car. At night he must ride in the rear end of the rear car and must have near at hand the necessary flags, lanterns, fuses and torpedoes.” So that under that rule that has just been read to you, in the daytime—

COURT.—The rule speaks for itself.

Q. I believe that is true. Now, Mr. Challander, when these two blasts that you have described were given, where would you say the train was?

(Testimony of Richard W. Challander.)

COURT.—You mean the last?

Q. No, the first one; the first one.

COURT.—The first signal; I don't know whether he said two blasts the first time. That may be right.

Mr. DIBBLE.—I understood him to say two blasts. Am I right in that?

A. Yes, sir.

COURT.—The first signal you got was two blasts?

A. Yes, sir.

Q. That is the way I understood; I may be wrong. When you got those two blasts where was the train with respect to Saco, how far was it away from Saco? A. Possibly a mile out. [251—211]

Q. I didn't hear.

A. Possibly a mile from Saco.

Q. One mile from Saco? A. Possibly; yes.

Q. Were you aware of the fact there was a slow order in existence covering two miles west of Saco?

A. Yes, sir.

Q. You knew that that was the order?

A. Yes, sir.

Q. And then at the time these two blasts were given, you were passing through that construction area, weren't you? A. Yes, sir.

Q. And how fast would you say the train was going at the time the engineer was given these two blasts?

A. Well, at that particular time the engineer had previously reduced the speed of the train on

(Testimony of Richard W. Challander.)

that portion of the track covered by this order, and at that the time that the communication bells were given, we were possibly going eighteen or twenty miles an hour.

Q. Eighteen or twenty miles an hour?

A. To my recollection.

Q. Those two blasts that were given, what would that mean to an engineer? What would he be supposed to do on receiving those two blasts?

A. To stop.

Q. Would he be supposed to stop just as soon as he could?

A. Well, the rule says stop at once; he would use his judgment, I suppose.

Q. Now, with a train of eleven cars besides the engine, and this very train you had there, in what length of time would it take [252—212] to bring that train to a stop if it was going eighteen or twenty miles an hour?

A. All depends on the conditions.

Q. Conditions as they were there at that time.

A. That would all depend on the reduction made in the brake pipe.

Q. Assuming that the train was going eighteen or twenty miles an hour, they had made that reduction you speak of, and were actually going eighteen or twenty miles an hour, assuming that was true, in what length—

A. It is true, as far as my recollection is, that is, the speed.

(Testimony of Richard W. Challander.)

Q. Then couldn't you state in what length of time it would bring the train to a stop?

A. Well, an emergency stop would stop—an emergency stop differs from a service application in this respect. That the emergency stop applies the brakes as quickly and as hard as possible, and in a service stop it is generally a slow stop.

Q. This signal you got, was it an emergency or a service stop? A. A service stop.

Q. Wasn't a signal to stop at once?

A. One of the signals that we get to stop.

Q. That is, this two blasts?

A. That is to stop at once, sir.

Q. I thought I asked that—if that didn't mean for the engineer— A. To stop at once.

Q. When he got these two blasts—

A. To stop at once.

Q. If that didn't mean to stop at once?

A. Yes, sir.

Q. Now, I want you to tell the jury in what distance could he stop the train at once, if he was going at eighteen or twenty [253—213] miles an hour when he got these two blasts?

Mr. ROCKWOOD.—You mean if he made an emergency operation?

Mr. DIBBLE.—No, I mean under that very signal he is telling about.

Mr. ROCKWOOD.—How fast *could have* done it, or how far did it take him to stop.

Mr. DIBBLE.—Generally what length of time does it take to stop a train going eighteen or twenty miles an hour, this very train?

(Testimony of Richard W. Challander.)

Mr. ROCKWOOD.—I think the witness is entitled to know the circumstances to be assumed.

COURT.—Emergency stop or ordinary stop?

Q. I will withdraw that question, and I will ask this: Assuming, Mr. Challander, that you have this very identical train in which you were riding as fireman, consisting as I understand it of eleven coaches and an engine, that very train now, and on that very track, that has been testified to here in the testimony, and suppose that when you were on this main line here, at a point a mile and a quarter or such a matter from Saco, two blast signals were given to the engineer, meaning for him to stop the train at once, if that is what it meant, and suppose at that time he was going at eighteen or twenty miles an hour, how long would it take him to bring the train to this stop—what distance?

A. It depends on the application he makes.

Q. How soon could he stop it if he wanted to?

A. That I couldn't tell you; he could stop very suddenly if he wanted to. [254—214]

Q. In what distance could he stop if supposed to stop at once?

A. Well, sir, those hypothetical questions, I wouldn't care to answer; I haven't seen any figures or tests on that.

Q. Could he stop in five hundred feet?

A. Yes, sir.

Q. Could he stop in less than five hundred feet?

A. Probably.

Q. How much less? A. I don't know.

Q. Wouldn't take half a mile to stop, would it?

(Testimony of Richard W. Challander.)

A. If he didn't want to take half a mile, no.

Q. Suppose were going fifty miles an hour, and got these two blasts to stop at once, what distance would it take to bring the car to a stop?

Mr. ROCKWOOD.—I don't think that is competent. No evidence going at fifty miles an hour.

Mr. DIBBLE.—Evidence going half a mile before stopping and I have a right to claim from that that the speed of the train was greater than what the witness testified.

COURT.—He can answer. Answer the question if you can.

A. Ask the question again, please.

COURT.—How long would it take to stop a train going fifty miles an hour?

A. All depends on conditions and the application made.

Q. Take the conditions that existed at this time, we inquired about?

A. How long would it take to stop it?

Q. Yes, going fifty miles an hour?

A. I don't know.

Q. Why? [255—215]

A. Because I have no test figures, never witnessed a test on how long it would take to stop a train going fifty miles an hour.

Q. Have you ever ridden on a train going that fast? A. Yes, sir.

Q. When called on to stop suddenly?

A. Yes, sir, I have.

Q. Can't you, from your experience as a fireman and engineer, give the jury some idea of how long

(Testimony of Richard W. Challander.)

it would take to stop a train of eleven cars and an engine when going at fifty miles an hour?

A. As I said before, it is a hypothetical question. Depends on the reduction made by the engineer from the brake pipe and the pressure conveyed to the brake cylinder how long it will take to stop the train.

Redirect Examination.

(Questions by Mr. ROCKWOOD.)

Now, in answer to a question, when you said that the train going at eighteen miles an hour on this stretch of track, with conditions as they were at the time could be stopped in five hundred feet or such, what kind of application of air would be required to stop in that distance?

A. Emergency application.

Recross-examination.

(Questions by Mr. DIBBLE.)

How many blasts do you give for service application? A. How many blasts?

Q. Yes. A. There is no such signal. [256—216]

Q. There is no such signal?

A. No, sir, not to my knowledge.

Q. What kind of a signal was given when you *say* were signaled the second time?

A. Just a series of blasts; didn't mean anything.

Q. That wasn't given by any train man apparently?

A. Well, the signal—on any occurrence of that

(Testimony of William McCloud.)

kind, you would generally lay to some leakage in the line causing the bell to operate.

Witness excused. [257—217]

TESTIMONY OF WILLIAM McCLOUD, FOR
DEFENDANT.

WILLIAM McCLOUD, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Where do you live, Mr. McCloud?

A. Havre, Montana.

Q. And you work for whom?

A. Great Northern Railway Company.

Q. What is your position with the Great Northern?
A. Brakeman.

Q. Were you a member of the train crew of this Knight Templars Special near Saco, on the 13th of July, 1928?
A. Yes, sir, I was.

Q. What was your position in the train crew?

A. Forward brakeman.

COURT.—Where was your station? You say forward brakeman; what does that mean?

A. He works the head end of the train, forward in the train.

COURT.—Any particular car you are to remain in?

A. I was riding in the baggage-car.

Q. On this stretch of track, from the stockyards

(Testimony of William McCloud.)

west of Saco into Saco, you say you were riding in the baggage-car? A. Yes, sir, I was.

Q. Do you remember a stop of the train at any time in that stretch before you reached the station at Saco? A. Yes, sir.

Q. Where did that stop occur?

A. On the bridge, about a quarter of a mile west of the switch leading to the east-bound passing track. [258—218]

Q. Prior to that stop did you notice any rough handling of the train? A. I did not.

Q. When the train stopped that time, what did you do?

A. I started to get down from the baggage-car just when he stopped; then he started up slowly.

Q. How far did he run after the first stop?

A. After the first stop on the bridge?

Q. Yes.

A. I would say he ran probably a hundred and fifty feet until he—

Q. Now, it has been testified that the train eventually got on the side-track there at Saco; were you with the train when it got on the side-track?

A. When it got on the switch?

Q. When it got onto the side-track.

A. Was I on the train?

Q. Yes. A. No, sir, I was on the engine.

Q. Tell us now from the time of that second stop until it got on to the side-track what you did with respect to the operation of that train, and what the movement of the train was.

A. When he made the second stop I left the bag-

(Testimony of William McCloud.)

gage-car and went on up to the engine and got on the pilot, that is the front end of the engine; rode it up until he made the third stop at the switch, where I got off and lined up the switch to enter the passing track, and I waited and looked at my switch point; when we pulled out I boarded [259—219] the engine, and rode from there on in, on the engine.

Q. When did you first hear that an accident had happened?

A. When I was along about halfway back over the train.

Q. You say when halfway back. After the train got on the passing track what did you do? Where did you go? What did you do?

A. When we got in on the passing track, I stepped down off the engine, looked towards the rear and saw that the switch was still lined up for the passing track. I started back towards the rear of the train to line up the switch for the main line, so Number Three would not run through the switch.

COURT.—About halfway back on that trip that you heard of the accident, was it?

A. Yes, sir.

Q. Did you go back to the rear end of the train to line that switch? A. I did.

Q. Was the rear brakeman there at that time?

A. No, sir.

Q. And you heard of the accident when you were about halfway back on that trip? A. Yes, sir.

Q. Do you remember after that first stop west of Saco, and after the train had started up, do you re-

(Testimony of William McCloud.)

member what kind of a stop the engineer made next? Was it a smooth stop, or a rough stop, or what? A. It was not a rough stop, no, sir.

Q. At the time he made that second stop where were you actually standing or sitting, in the car or on the ground? [260—220]

A. I was standing in the baggage-car door when he made the second stop.

Q. Do you know how fast the train was moving just prior to the first stop?

A. Prior to the first stop?

Q. Yes.

A. Well, I would judge from the stockyard, that is two miles west to half a mile west of the bridge, he was traveling about twenty miles an hour.

Q. How would you describe the first stop he made—what kind of a stop was it?

A. Was a very smooth stop.

Cross-examination.

(Questions by Mr. DIBBLE.)

You are still in the employ of the company, the Great Northern Railway Company, are you?

A. I beg pardon?

Q. You are still in the employ of the Great Northern Railway Company, are you?

A. Yes, I am.

Q. And your home is in Montana?

A. Yes, sir.

Q. And how long have you worked for the company? A. A little over twenty-five years.

Q. Have you always worked as a brakeman?

(Testimony of William McCloud.)

A. Yes, sir.

Q. Have you ever acted as an engineer?

A. No, sir.

Q. Or a fireman either? A. No, sir. [261—
221]

Q. And at the time you were on the train immediately before the accident were you in the baggage-car? A. Yes, sir.

Q. What were you doing, do you remember?

A. In the baggage-car?

Q. Yes.

A. I was standing up in the baggage-car.

Q. Were you performing any work of any kind?

A. Well, just your usual duty of brakeman, standing there, is all until there was something to do; nothing to do in the baggage-car at the time.

Q. You were in the body of the car, were you?

A. Right near the door, yes.

Q. Were you paying particular attention to whether the train was roughly handled or anything?

A. I was, yes.

Q. Why?

A. I was paying particular attention because we had a meet on this train number three at Saco; particularly watching where we were at and how the train was handled.

Q. Were you worried about whether you would be able to clear it or not?

A. No, sir, I was not worried because we had a positive meet on the train there.

Q. You had an order to give that other train the right of way, didn't you?

(Testimony of William McCloud.)

A. We had an order to take the siding there for number three; positive meet of number three; number three couldn't leave Saco until we arrived; positive meet.

Q. And you were paying particular attention, were you, to [262—222] the movement of the train as to whether being roughly handled or not?

A. I was, yes, sir.

Q. And the only reason for that was because you had to make this clearance?

A. Well, I usually watch the movement of the train when I am on duty.

Q. Why do you do that?

A. That is part of our duties, to watch the movement of the train at all times.

Q. Did you ever notice these trains swaying and lurching at other times?

A. I didn't notice this one at this particular time.

Q. At any other times, did you ever notice the train roughly handled? A. No, sir.

Q. Never did see a train roughly handled which you rode on? A. No, sir.

Q. And you have been railroading twenty-five years? A. Twenty-five years.

Q. And during that time you have never been on the train where it was roughly handled?

A. Not that I could say was roughly handled.

Witness excused. [263—223]

TESTIMONY OF H. R. SPOONER, FOR DEFENDANT.

H. R. SPOONER, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Where do you live, Mr. Spooner?

A. Havre, Montana.

Q. In July, 1928, whom did you work for?

A. Great Northern Railway Company.

Q. What was your position at that time with the Great Northern Railway Company?

A. I was conductor.

Q. Were you a member of the train crew of this Knight Templars Special, near Saco, Montana, on the evening of July 13, 1928? A. Yes, sir.

Q. What were your duties in the crew?

A. Sir?

Q. What were your duties on the train?

A. I was conductor of the train.

Q. Are you familiar with that stretch of the track from a point near the stockyard, west of Saco, into the station at Saco? A. Yes, sir.

Q. During that—while the train passed over that stretch of track was there any stop of the train, before it reached the station at Saco? A. Yes, sir.

Q. Where were you riding at the time of that stop? A. In the baggage-car.

Q. Was any other member of the train crew with you A. Yes, sir. [264—224]

(Testimony of H. R. Spooner.)

Q. Who?

A. The head brakeman, Mr. McCloud.

Q. Prior to the time of the stop which you refer to, and if there were more than one, I am referring now to the first stop, was there any rough handling of the train that you were aware of?

A. No, sir, there was not.

Q. Do you know how far the train was, the head-end of the train was from the Saco station at the time of that stop you have referred to?

A. Well, about half a mile, I would say.

Q. After he made the first stop were there any other stops between there and the station at Saco?

A. Yes, sir.

Q. When was the next stop?

A. Well, it is a very short distance; the train just nicely got started and then stopped again.

Q. How far had it gone after the first stop until it stopped the second time?

A. Well, I wouldn't say over a hundred feet, something like that.

Q. What kind of a stop was the second stop; was it a smooth stop, or a rough stop?

A. Well, it wasn't what I would call a rough stop, although it was rougher than the first one was.

Q. Rougher than the first one? A. Yes, sir.

Q. Now after that second stop was there any further stop between that time and the time the train was on the passing track?

A. Just when we stopped to open the switch.

[265—225]

Q. Were you on the train all during this time?

(Testimony of H. R. Spooner.)

A. During this specified time?

Q. Yes.

A. I was in the baggage-car all the way.

Q. You remained in the baggage-car until you got to the passing track? A. Yes, sir.

Q. What did you do then?

A. Well, I was watching back to the rear and saw the switch wasn't closed, so when I came down on the ground to see what was the reason the flagman didn't close the switch, and about that time someone informed me that one of our passengers had fallen off the train.

Q. Of course, you didn't see the accident?

A. No, sir.

Q. And you didn't learn of it until that time?

COURT.—By the flagman you mean the rear brakeman?

A. Yes, sir.

Q. And you didn't learn of the accident at all until after you were on the passing track and off the train? A. No, sir.

Q. Prior to this first stop that you have referred to, what was the speed of the train?

A. I would say around twenty or twenty-five miles an hour.

Q. What kind of a stop was that first stop?

A. Ordinary service stop.

Q. You have had a good many years experience in railroading, haven't you? A. Yes, sir.

Q. Are you familiar with the practices on the Great Northern [266—226] as to the duties of

(Testimony of H. R. Spooner.)

the rear brakeman in getting on and off the trains, passenger trains? A. Yes, sir.

Q. Will you tell us what the practice on the Great Northern was at this time?

Mr. DIBBLE.—Just a moment; that is objected to, if the Court please, for the reason that the rule governing it is in evidence.

COURT.—Getting off and on trains?

Mr. DIBBLE.—Yes.

COURT.—Is there a rule for getting on and off trains?

Mr. DIBBLE.—Yes, your Honor.

Mr. ROCKWOOD.—That is not quite correct. As a matter of fact they may have been violating the rule. I am asking what the practice was, not the rules.

COURT.—He can answer.

Q. What was the practice in getting on and off trains for the rear brakeman?

A. During the hours when the passengers were in the observation-car, the brakeman is required to get on and off the head-end of the car, and ride in the forward end of the car as much as possible.

Cross-examination.

(Questions by Mr. Dibble.)

Now, then, Mr. Spooner, this train was governed, as far as the movements of the rear brakeman were concerned by this rule I have read here, Rule 836?

A. Yes, sir.

Q. That is the standard rule governing the operation of trains? A. Yes, sir. [267—227]

(Testimony of H. R. Spooner.)

Q. Now isn't it true, Mr. Spooner, that this getting on and off of the front end of the observation car, under this rule, applies to the daytime only?

Mr. ROCKWOOD.—If your Honor please, I think that is argumentative. The language is in the record, and I don't think this witness should be required to interpret the language.

Mr. DIBBLE.—I am perfectly willing to leave the written rule in, but counsel saw fit to say they may have violated the rule.

COURT.—You are asking him to interpret the rule now.

Mr. DIBBLE.—Yes.

COURT.—It is not necessary for him to do that.

Q. Now I will ask you if this was not in effect at the time, that during the daylight hours, the brakeman, the rear brakeman we call him, should get off the head end of the car? A. Yes, sir.

Q. That was the established rule? A. Yes, sir.

Q. And that was because during the daytime the passengers might be on the rear of the observation-car observing the scenery and watching the country as they went along with the train? A. Yes, sir.

Q. And isn't it the idea that in the daytime, when the passengers might be out there, you would not want to discommode them by getting off the end?

A. Yes, sir.

Q. So you should use the front end of the observation-car. That is true, isn't it?

A. Yes, sir, that is it. [268—228]

Q. And that is the rule in the daytime?

(Testimony of H. R. Spooner.)

A. Yes, sir.

Q. And this accident occurred around about what time of the night? Somewhere around about ten thirty, wasn't it? A. About ten thirty, yes.

Q. And the rule there would be—wasn't this rule in effect here: "At night,"—referring to the rear brakeman—"he must ride in the rear end of the car, and must have near at hand necessary flags, lanterns, fuses and torpedoes." That was in effect at the time? A. Yes, sir.

Q. And you don't know of your own knowledge where the rear brakeman was riding, because you were not back there? A. No, sir, I was not.

Q. But, if he was riding in the back end of the coach just ahead of the observation car, he was there in violation of this rule I have read.

COURT.—That is asking him for a conclusion.

Mr. DIBBLE.—Yes, it is. He has already answered.

COURT.—You can argue that to the jury just as well as to ask this man about it.

Mr. DIBBLE.—I thought it might be cleared.

Mr. ROCKWOOD.—Do you want a little argument now?

Mr. DIBBLE.—No, I think I can get along.

Mr. ROCKWOOD.—I have some things to say about it.

Q. Now, Mr. Spooner, how long have you been in the employ of the Great Northern Railway Company?

A. I was in their employ thirty-one years about.

(Testimony of H. R. Spooner.)

Q. And you are still in the employ of the company? [269—229]

A. No, sir, not right now I am not.

Q. How long since you quit work for the Great Northern? A. A little over a year.

Q. Are you retired now, or working for some other line?

A. Well, I am practically engaged in the grocery business with a son-in-law of mine.

Q. Where do you live Mr. Spooner?

A. Havre, Montana.

Q. Now then, you had worked as a conductor for twenty-five years, do you mean?

A. Well, I was brakeman and conductor thirty-one years on that particular division.

Q. At this particular time you were in the baggage-car, were you with the man just on the stand?

A. Yes, sir.

Q. You were not paying particular attention, were you Mr. Spooner, as to whether the car was lurching or not, before you were notified that somebody had fallen off?

A. Well, I was paying particular attention to the movement of the train at all times, that was my business.

Q. But you were not paying particular attention to whether it was lurching or not, were you?

A. Yes, I was.

Q. Why were you?

A. Because I would have noticed it and known

(Testimony of H. R. Spooner.)

was something wrong, and it would have been necessary to report it.

Q. Do trains lurch at times?

A. They do sometimes; yes.

Q. And your experience during that twenty-five years—you have known lots of lurches on trains, haven't you? [270—230] A. Certainly have.

Q. And you have known lurches violent enough to throw somebody walking through the train, haven't you? A. Yes, sir.

Q. For instance, people would be thrown while walking from one vestibule to another, that has happened? A. Yes, sir.

Q. That would be what you boys call rough handling of the train? A. Yes, sir.

Q. Sometimes if you take a freight engineer and put him on a passenger train, is he a little bit rougher than the ordinary passenger man?

A. As a rule they are more careful.

Q. They are even more careful? A. Yes, sir.

Q. Do you remember who it was that told you that a Sir Knight had fallen off the train?

A. No, I don't; it was one of the passengers, one of the Sir Knights.

Q. One of the Sir Knights; was not the brakeman himself? A. No, sir.

Witness excused. [271—231]

TESTIMONY OF H. B. CLINKNER, FOR DEFENDANT.

H. B. CLINKNER, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Q. Where do you live, Mr. Clinkner?

A. Portland, Oregon.

Q. Who do you work for?

A. The Pullman Company.

Q. What is your position with the Pullman Company? A. Conductor.

Q. Were you on this Knight Templar special train which went through Saco, Montana, on July 13, 1928? A. I was.

Q. Were you on duty on that train?

A. Yes, sir.

Q. As a Pullman conductor?

A. I beg your pardon?

Q. As a Pullman conductor?

A. As a Pullman conductor.

Q. Prior to the time that the train got into Saco, Montana, where were you riding for the last two or three or four miles?

A. In the parlor-car, which was in the center of the train.

Q. What was going on in that parlor-car?

A. They were dancing.

(Testimony of H. B. Klinkner.)

Q. The people that were going to this convention had this for a dancing-car? [272—232]

A. The people on the party; yes, sir.

Q. Do you remember—were you conscious of any stops of the train before going onto the passing track at Saco? A. No, sir, I do not.

Q. Did you get off the train at Saco?

A. At Saco, when they made the final stop at the station.

Q. When did you first hear of this accident?

A. After stopping at the station.

Q. Well now, prior to that time of getting into Saco, was there any interruption to the dancing in that car? A. None that I noticed; no.

Q. Coming into Saco, was there any rough handling of the train, of which you were aware?

A. Not that I knew.

Q. That in any way affected the dancing in the car? A. No, sir.

Q. You didn't see the accident, of course?

A. No, sir.

Cross-examination.

(Questions by Mr. DIBBLE.)

You are still in the employ of the Pullman Company, Mr. Klinkner? A. Yes, sir.

Q. How long have you been in the company's employ? A. Eighteen and a half years.

Q. And at this time immediately before you heard that a man had fallen from the train, were you paying any particular attention as to whether the train was lurching or not? A. No, sir.

(Testimony of H. B. Clinkner.)

Q. You were not paying any particular attention to that? You [273—233] were in the parlor-car there?

A. I was in the parlor-car watching the dancing.

Q. Watching them trip the light fantastic?

A. Yes, sir.

Q. The Sir Knights were having a little pleasure there?

A. Yes; were, I imagine, about twenty-five or thirty in there dancing.

Q. With their ladies? A. Yes, sir.

Q. All having a nice time? A. Yes, sir.

Q. And you were riding along there, enjoying it along with them? A. Yes, sir.

Q. And were not paying any particular attention except to see how good they could dance?

A. It is my place to see that the people enjoy themselves on a trip of that kind.

Q. Sure.

Witness excused. [274—234]

TESTIMONY OF LEWIS B. BROWN, FOR DEFENDANT.

LEWIS B. BROWN, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Where do you live, Mr. Brown?

A. Havre.

Q. Montana? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. By whom are you employed?

A. The Great Northern.

Q. And were you a member of the train crew of the Great Northern on this Knight Templar special near Saco, Montana, on July 13, 1928? A. I was.

Q. What was your position in that train crew?

A. Flagman or rear brakeman.

Q. You have been here during the entire trial, haven't you? A. Yes, sir.

Q. You have heard this testimony from the various witnesses that a brakeman came through the train and used language to the effect generally, that a Sir Knight had fallen from the train, or a Sir Knight fell overboard? A. Yes, sir.

Q. Are you the man that came through the train and made that announcement? A. Yes, sir.

Q. Now, Mr. Brown, going back for a distance of say five miles before the train reached Saco, will you describe, please, the [275—235] characteristics of the track as to whether it is straight or curved? A. There is two curves.

Q. Where is the most westerly of these two curves?

A. I judge it is five miles west of Saco—four and a half miles.

Q. And where is the second—over five miles?

A. Between four and five miles, I would judge; possibly a little over five.

Q. Where is the second curve?

A. Just before you get to the stockyard. The stockyard track is on this tangent.

(Testimony of Lewis B. Brown.)

Q. Now, before you came to that first curve, where were you riding on the train?

A. I think in the smoking-room, before I came to the first curve.

Q. Before you came to the first curve?

A. Yes, sir.

Q. Well, at about that time did you perform any duties in connection with the operation of the train?

A. Between the two curves I walked to the back end of the train and looked out, not outside of the observation-car, but to the back of the car.

Q. I don't understand that; you will have to talk louder.

A. I walked to the back of the car, not out on the platform, but to the back of the car, and looked out, to locate myself.

Q. After you had looked through the back of the car, as you say, what did you do next?

A. I sat down in the back part of the car, that is, in the parlor end of the car.

Q. You refer to the observation-car? [276—236]

A. Yes, to the parlor end of the observation-car.

Q. Then after you—how long did you sit down there in the parlor end of the observation-car?

A. Until they rounded the curve on the tangent by the Saco stockyards.

Q. When they rounded the curve there at the stockyards where did you go?

A. Into the rear end of the first sleeper ahead of the observation-car.

Q. What did you have in your hand, if anything?

(Testimony of Lewis B. Brown.)

A. My lantern, a white lantern.

Q. A white lantern? A. Yes, sir.

Q. When you got to that rear vestibule of the first car ahead of the observation-car, what did you do?

A. Opened the vestibule door on the north side of the car.

Q. Now, before we go any further Mr. Brown, I want you to—I have some photographs here. I have here a series of photographs which are marked C, D, E, F, G, H, I and J, which are photographs of the vestibule of a Pullman car. Will you look at these photographs and tell us whether these photographs correctly show the kind of vestibule on the car which was next ahead of the observation-car, the one where you say you were when you opened the vestibule door?

A. Yes, sir, those are the identical ones.

Q. Is that the same car as the car which was the one ahead of the observation-car on this train?

A. Built identically the same.

Q. Not the same car, but built identically the same, you say? [277—237]

A. Built identically the same.

Mr. DIBBLE.—I offer these photographs in evidence.

(Photographs marked Defendant's Exhibits "C," "D," "E," "F," "G," "H," "I" and "J.")

Mr. DIBBLE.—You know it is the same kind?

Mr. ROCKWOOD.—Yes, we went and found one.

Mr. DIBBLE.—We have no objection.

(Testimony of Lewis B. Brown.)

Q. You say you opened the vestibule door?

A. Yes, sir.

Q. I show you Defendant's Exhibit "G." Tell us what that shows as to the condition of the car, compared with what it was after you had made your first move there in the vestibule?

A. This is as the car would appear after I had opened the door, and also at the time the accident happened.

COURT.—Speak louder, please.

A. This is identical with the position of the door when the accident happened.

Q. Now, in that picture there is a trap, or a continuation of the floor over the door? A. Yes, sir.

Q. How does the door in that car open? That is, does it swing—are the hinges toward the front end of the car, or towards the rear end of the car?

A. Towards the end of the car, that is, the enclosed end; towards the body of the car; from the vestibule to the body of the car.

Q. Does this exhibit "I," properly show how the door swings? Is that correct? A. Yes, sir.

Q. When the door is open which way does the open trap swing? [278—238]

A. Up against the door of the car.

Q. And does this exhibit "G" correctly show the direction in which the trap swings?

A. Yes, sir.

Q. On that car is the vestibule—which must be opened first, the trap, or the door? A. The door.

Q. Is it possible to open the trap without opening the door?

(Testimony of Lewis B. Brown.)

A. No, sir, impossible; the door sets on—over the edge of the trap.

Q. I show you exhibit “F.” Does that show correctly the condition of the vestibule after the door is opened and the trap is up?

A. Yes, sir, after the door is opened and the trap is raised.

COURT.—I doubt whether the jury is getting very much.

Mr. ROCKWOOD.—(Showing pictures to jury.) This shows the vestibule as he says it was when the accident happened, with the trap down and the door open. This next picture simply, we put in to show the way the door operates, and this next picture is put in to show the way the trap operates, swings up against the body of the car. The next picture shows the vestibule completely opened up, with the door open and the trap up.

Q. Now, I show you another picture of that vestibule, Mr. Brown, with the door open and the trap down, but taken from a slightly different angle. Inside is a horizontal lever, right inside. Was the car on which this accident happened equipped with a lever, as shown in that picture?

A. Yes, sir.

Q. That is Exhibit “E.” Now I show you Exhibit “C,” which is an interior picture of the vestibule with the trap down and the [279—239] door open. Will you tell us how that picture compares with the condition of the car at the time this accident happened?

(Testimony of Lewis B. Brown.)

A. Well, it compares with the exception of the south door was closed.

Q. You mean the door into the—

A. The south door of the vestibule. This was taken with both doors open, you see; otherwise it is identical.

Q. You mean that the photograph is taken with both doors of the vestibule open? A. Yes, sir.

Q. Whereas, at the time of the accident, only the one which you opened, was in fact open?

A. Just the one, was the only one.

Q. Now, I show you another interior view of the vestibule. How does that compare with the condition of the car as it was when this accident happened? A. That compares.

Q. Is it the same, or different?

A. It is the same, yes, sir; this is the same.

Q. This last one that I show you is Exhibit "B." Now I show you Exhibit "I," which is an interior view with the door ajar. How does that compare with the condition at the time the accident happened?

A. The door was back wide open and latched open.

Q. At the time the accident happened?

A. Yes, sir.

Q. So this picture, showing the door ajar, does not correctly represent the condition as it actually was at that time? A. No, sir.

Q. Now, Mr. Brown, showing you Defendant's

(Testimony of Lewis B. Brown.)

Exhibit "E," tell us [280—240] where in that vestibule there were lights, if any, at that time?

A. There were dome lights directly over the trap on each side, in the vestibule.

COURT.—Two lights in the vestibule?

A. Two lights, one over each trap; one on each side, light, yes.

Q. Now, can you show us in that picture—does that picture I have just referred to show the light?

A. This shows light; it is concave. The light is put in concave in the top of the car, and is porcelain, I should judge; some white material, lined, that to reflect the light down.

Q. And that round white spot in this picture is the dome light you refer to? A. Yes, sir.

Q. At the time this accident happened what lights were on in the vestibule?

A. All the dome lights, or all the vestibule lights were burning.

Q. How many vestibule lights were burning in this particular vestibule?

A. Two, one on either side light.

Q. Now, I show you this interior picture, which is Exhibit "I." Showing a different interior, with the door ajar, and up above is a kind of white line, sagging white line. What is that white line?

A. That is the communicating signal to the engine, air signal, the communicating signal.

Q. Where is that cord in the vestibule, with respect to the trap, the trap on which you were standing?

(Testimony of Lewis B. Brown.)

A. It stands on a line about over the inner edge of the trap.

Q. Approximately over your head, too?

A. A little in; just virtually right over the inner edge of the [281—241] trap.

Q. Now, Mr. Brown, you have said that you came up into this vestibule and opened the door?

A. Yes, sir.

Q. And let the trap down? Was there any operating reason why you used that particular door, rather than the door at the front end of the observation-car itself? A. Yes, sir.

Q. Tell us what that operating reason was.

A. The doors and traps are different in the observation-car that we had at that time, and this car. In order to get out on the front end of the observation-car, on the observation platform, that is, on the platform on the observation-car, you would have to open the trap and then the door. On the other one you open the door and then the trap.

Q. Why did that make any difference to you in your train operation?

A. The rules require that when we close a switch we must drop off at the opposite side of the train from the switch, and when I drop off at a switch, in closing the door on the Pullman car I would leave the trap down and the door closed; and on the Great Northern observation-car, if I closed the door I would leave the door closed but the trap open.

Q. And what was your intention when you opened this door, as to getting off the train?

(Testimony of Lewis B. Brown.)

A. When I go off, to pull the door shut, and after closing the switch, to go to the rear end of the observation-car to ride through the side-track.

Q. What was the duty which you had to perform in connection with getting the train onto the side track? [282—242]

A. Close the passing track switch, or line it up for the main line.

Q. What operating duty did you have after the train had left the passing track to go back onto the main line on its trip east?

A. To close the eastward passing track switch, the switch at the east end of the passing track, after the train had cleared it.

Q. And it is that operation which you were intending to do, when you started up into the vestibule? A. Yes, sir.

Q. Now, after you opened this vestibule door, what position did you take?

A. I was standing with my—

Q. Stand up; I think you can illustrate.

A. Standing with my lantern in my left hand, holding the brake lever, in the vestibule, with my other hand resting against the door; leaning out looking forward.

Q. Where was your hand, your right hand, if you remember, with respect to the height of your shoulder?

A. Up almost level, I would judge.

Q. While you are right there, as nearly as you can, show the position in which you stood when you

(Testimony of Lewis B. Brown.)

were leaning out of the car. (Witness illustrates.) Now, while you were standing in that position, when were you first aware, if you were aware, of anybody being near you?

A. When there was a hand laid on my forearm, or wrist.

Q. That hand was laid on which arm of yours, your left arm or your right arm?

A. The right arm.

Q. How was it laid on you Did it grip you, or was it laid on you, or how? [283—243]

A. Just ordinary pressure, like you would lay your hand on one's arm to attract their attention.

Q. Now, stand up again. When that hand was laid on your arm, when you had your right arm out, what did you do next?

A. I dropped my arm to look around that way, to see who it was.

Q. Just turn slightly towards the right?

A. Turned slightly to the right, or looked back to see who it was.

Q. What was your left hand doing at that time?

A. Still holding the brake lever.

Q. Now, when you looked around what did you see, and then what happened, Mr. Brown?

A. I saw—there was someone walked by me and stepped off—just stepped off the platform.

Q. What did you do to prevent it?

A. I grabbed at him.

Q. Could you get hold of him at all?

A. No, sir.

Q. At that moment was there a lurch of the train?

(Testimony of Lewis B. Brown.)

A. No, sir.

Q. As that person walked by you was that person—did he have his arms extended? A. No, sir.

Q. As an unbalanced person? A. No, sir.

Q. Or did he appear to be balanced?

A. Just as though anyone would walk along.

Q. As he made those steps from the car, what did you observe as to what happened to him? [284—244]

A. Well, I naturally looked to see that he didn't go under the wheels of the car, and saw him light.

Q. Could you see how he lit?

A. Yes; he lit with his face to the west, his back to the way the train was running.

Q. Did he light head first, or feet first?

A. Feet first, and then set back down, and then straightened up lengthwise, full length.

Q. Fell back on his back? A. Yes, sir.

Q. When he did that, Mr. Brown—when that happened, what did you do then?

A. Pulled the signal cord for them to stop.

Q. Then what did you do?

A. Kicked the car door shut, and then went back and notified them that one of the party had fallen off the train, and advised someone not to let the train back up until we located the party that had fallen off, and also someone to advise the conductor of the accident.

Q. Do you know who it was you made those remarks to? A. No, sir.

Q. Then where did you go?

(Testimony of Lewis B. Brown.)

A. Went to the rear of the train; as soon as they were slow enough, dropped off; almost immediately dropped off after getting back there.

Q. Where did you go then?

A. Went back up the track to locate the party that had fallen off.

Q. Did anybody go with you?

A. I got off first and started, but there was one or two of [285—245] the men that passed me, and one of them took my lantern. He says, "I can outrun you, let me have your lantern," and just took it and went on.

Q. Did you go back to where Mr. Shellenbarger was lying? A. Yes, sir.

Q. How did you find Mr. Shellenbarger lying when you got there?

A. He was lying on his back, and one arm was—I forget which arm it was—but one arm or hand was under his back.

Q. Now, which direction was his head?

A. To the east.

Q. To the east? A. Yes, sir.

Q. And how did his body lie there at that particular time, with respect to the rails of the track?

A. Parallel.

Q. Did you examine the ground or check up to see whether there was any evidence that he had slid on the ground after he fell?

A. He had slid a very little, yes.

Q. You say a very little; how far did he slide?

A. Well, I wouldn't judge that he slid more than a foot; just a very little.

(Testimony of Lewis B. Brown.)

Q. Now, did you pick up any objects around there belonging to Mr. Shellenbarger? A. No, sir

Q. Did you see any objects lying on the ground?

Q. I saw his glasses, and his his glass-case and pencil, or pen.

Q. How long did you stay back there?

A. Until they came and got him.

Q. Who came and got him?

A. Well, some of the men. [286—246]

Q. I mean, what kind of a conveyance?

A. An automobile.

Q. After that how did you get back to the train?

A. Walked back.

Q. And did anybody walk with you?

A. There were two or three of the party walked back with me.

Q. Do you know who they were?

A. No, I do not.

Q. What is your estimate, Mr. Brown, as to the distance the train was from Saco station at the moment that Mr. Shellenbarger fell off, that is, where he was found?

A. I would judge a mile.

Q. You didn't measure it, did you?

A. No, no, no. But I would judge we were about halfway down on the straight track between the switch and the tangent, or the curve.

Q. How fast was the train going, do you estimate, at the time that he fell?

A. I would judge from fifteen to eighteen, possibly twenty miles an hour. May have been a little

(Testimony of Lewis B. Brown.)

faster. Pretty hard to judge in the night, when you are standing on a coach.

Q. After you got back to the train did you see Mr. Shellenbarger further that night?

A. Yes, sir, I went up to the baggage-car.

Q. And I suppose there were a good many of the passengers around up there in the car?

A. There were quite a good many in there.

Q. Mr. Brown, how long have you worked for the Great Northern?

A. A little over nineteen years. [287—247]

Q. And has most of that time been spent in the passenger service? A. All but eleven months.

Q. In what capacity?

A. As brakeman, passenger brakeman, yes.

Q. As a passenger brakeman? A. Yes, sir.

Q. What is the operating practice on the Great Northern, as you have observed it, and as you have performed those duties yourself, as to the point where a rear brakeman will get on and off the train to perform his duties, during this period, day or night, when the passengers are up and about in the observation-car?

A. The forward end of the car, or the rear of the next car forward. Between the first and second cars.

Cross-examination.

(Questions by Mr. DIBBLE.)

Mr. Brown, referring to this first exhibit, this Exhibit "C," will you please state whether this door that I am pointing to here now with my pencil,—is that the door that you fastened back?

(Testimony of Lewis B. Brown.)

A. Yes, sir.

Q. And as you look at that picture there, are you looking towards the east? A. Towards the north.

Q. You are looking towards the north?

A. Yes, sir.

Q. And which way would the observation-car be on that picture? A. Be to the back of it.

Q. Would be that way?

A. Yes, sir. [288—248]

Q. The observation-car would be back there?

A. To the left of the picture.

Q. Yes, to the left of the picture. So a person coming from the observation-car, he would come through this opening here? A. Yes, sir.

Q. The observation-car being back there, would step in here? A. Yes, sir.

Q. And that is the door that you say you opened?

A. Yes, sir.

Q. And fastened back. Where are the hinges there? A. They are on the outer side.

Q. Over here?

A. This is the hand-rail; right here is the hand-rail, and that little knob that sticks up is the fastener for the trap when the trap is raised.

Q. So the hinges are over here on the outside edge? A. Yes, sir.

Q. So the door, if you wanted to close it, would swing back towards the observation-car, back that way, wouldn't it? A. Yes, sir.

Q. And if you wanted to—and you wanted to look ahead in the direction the train was going, to look

(Testimony of Lewis B. Brown.)

out to see Saco, or look up that way, you could if you wanted to stand here on the platform, couldn't you? A. Yes, sir.

Q. And pull the door back towards you so as to keep the opening there closed?

A. It could be done, but you run a risk of being knocked out of the door. [289—249]

Q. We will get to that later; but I just wanted to see what a person might do if they wanted to.

A. Yes, sir.

Q. The way that hinge is fixed there on the car, and the way the door swings in, you want to look out along the track towards the engine, you could stand there on the platform of the vestibule, couldn't you? A. Yes, sir.

Q. And, although you have the door open, you could stand there and leave it all closed except the part where your head and shoulders were sticking out looking towards the engine? Couldn't you?

A. Yes, sir, but that would be a foolish practice, a practice in violation of our book of rules.

Q. I will show you I think pretty soon, you broke the rule anyway.

Mr. ROCKWOOD.—You and I will argue that out.

Q. Yes, we will go into those matters later; but I just want to see what might be done to protect a person from injury, from an accident, who might be riding on the train. So if you wanted to, although you say would be contrary to your rules—

A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. You could, the way the door is hinged, open it and pull it over towards yourself as you stood there, and leave no more opening—

COURT.—You mean pull it back of him?

Mr. DIBBLE.—Yes. This door is not hinged that way.

COURT.—I think the jury understands. [290—250]

Mr. DIBBLE.—If I could find a door with hinges; if that right-hand door of those two doors had a knob on it, and the hinge was over on the right-hand side, you could open that door and stick your head and shoulders out, and look over there to the Clerk's office, and have all the door closed except the part where your head and shoulders are sticking out?

A. Yes, sir.

Q. So you could if you wanted to have opened this door—

COURT.—He has told you two or three times he could do that.

Q. And had you done that in this instance it would have prevented Mr. Shellenbarger from walking off the car, as you say he did, wouldn't it?

A. Yes, sir.

Q. Because he could have walked either into you or into this door, wouldn't he? A. Yes, sir.

Q. So, if you had been standing in that way, with the door open, this man couldn't have stepped off the train? A. He couldn't.

(Testimony of Lewis B. Brown.)

Q. And he couldn't have been thrown off the train?

COURT.—Did you close the door behind you and stand on the platform?

A. No, sir.

COURT.—Would leave a space between the edge of the door and the observation-car?

A. Just the same as this door; you can open the door and stand in the door. We will grant that door sits within an [291—251] inch of the edge of the platform. That is all the space that is outside the door, an inch or less on the platform when the door is closed.

Q. Now, referring to Defendant's Exhibit "B," the second one here, Mr. Brown, does this picture show this very same door that you spoke of?

A. Yes, sir.

Q. As it was fastened back? A. Yes, sir.

Q. At the time the accident occurred?

A. Yes, sir.

Q. It is just another picture then identical with this first one?

A. Taken at a little different angle.

Q. Taken at a little different angle. Were you standing on the steps? A. No, sir.

Q. Of the vestibule, or were you standing on the platform itself?

A. I was standing on the trap.

Q. You were standing on what I am pointing to there with my pencil? A. That is the platform.

Q. Where is the trap?

(Testimony of Lewis B. Brown.)

A. Here—no, this is the trap; yes.

Q. That is what I thought. The trap forms the floor, doesn't it, when down?

A. The floor over the steps; yes, the floor over the steps.

Q. When the trap is closed over the steps that makes the vestibule door, as far as that part of it is concerned, [292—252] over the steps.

A. It is a continuation of the floor of the vestibule when it is down.

Q. And there were four steps, weren't there?

A. Four steps, I think.

Q. Below the surface of this trap; and you were standing on the trap itself? A. Yes, sir.

Q. Now, is this trap about the same height as the floor of the back of the observation-car?

A. It is about—how is that?

Q. The same height from the ground?

A. Standard make, same height.

Q. Same height. In other words, if you were standing on the rear platform of this observation-car, and looking around that side of it, you would be standing up just as high? A. Just the same.

Q. Have as good a view as you would have from standing on the trap over these steps at the back of this coach? A. Same height.

Q. Elevation would be the same?

COURT.—Good a view of what?

Mr. DIBBLE.—Up towards the engine, in the direction he is looking.

COURT.—You mean outside of the train?

(Testimony of Lewis B. Brown.)

Mr. DIBBLE.—Looking around the track, your Honor.

A. He means the elevation from the trap to the ground.

Mr. ROCKWOOD.—If he were standing on the rear platform of the observation-car, he would be the same height from the ground as the rear platform or vestibule of the first car forward. [293—253]

Q. That is what I am trying to get at. Because, as I understand it Mr. Brown, you were there for the purpose of watching the operation of the train?

A. Yes, sir.

Q. And this work, whatever you were doing, required you to look ahead towards the engine, did it?

A. Yes, sir.

COURT.—Outside the train?

Mr. DIBBLE.—Yes, look outside.

COURT.—Look along the train?

Q. Yes, look along the train towards the engine; so if you wanted to you could have stood right there on the rear platform of this observation-car and looked around the left-hand end of that observation-car and looked along the train of cars towards the engine, couldn't you?

A. I could have, providing none of the passengers were in my way.

Q. You could have asked them to step out of your way, couldn't you? A. Oh, yes.

Q. Just like you asked them to step out of the way when you went back and jumped off after the

(Testimony of Lewis B. Brown.)

man was hurt? You went back afterwards and opened up the gate?

A. No, I went over the railing.

Q. But you got off the train from the back end, didn't you? A. Yes, sir.

Q. Why didn't you go off there from the rear end of this coach ahead of the observation-car?

A. I wanted to notify the men in there of the accident, and [294—254] also to notify them, or to get some of them to notify the conductor, of the accident, and advise him not to let the train back up until after we had located the party that had fallen off.

Q. This Defendant's Exhibit "E," that shows the steps better, doesn't it?

A. That shows the steps.

Q. This picture, Mr. Brown, shows the vestibule door open, as I understand it, but the trap which covers the steps, shows the trap closed?

A. Yes, sir.

Q. So that, according to your testimony, that was the way the train was, and that would make you be standing up here where I have my pencil, wouldn't it? A. Right on the edge of the trap.

Q. Right on the edge of this trap. You would be standing there that way, and your right hand would have hold of this grab-iron that is along the car, would it? A. No, sir.

Q. What did you have hold of with the right hand?

(Testimony of Lewis B. Brown.)

A. Resting against the door, about the height of my shoulder.

Q. You didn't have hold of this iron rail?

A. No, sir.

Q. It is put there to hang on to, isn't it, that grab-iron there?

A. Put there yes, for getting on and off the car.

Q. And if you were riding along there, a brakeman or anybody else riding along there, he could use that to steady himself by, couldn't he, as he stood there on the platform? [295—255]

A. It is too low.

Q. It is too low there? A. Yes, sir.

Q. That is for getting on and off?

A. On and off.

Q. Then what did you have hold of with your left hand?

A. Hold of the brake lever; it shows in one of these pictures.

Mr. ROCKWOOD.—Let's get this straight. He said with the right hand what did you have hold of?

A. The right hand was just resting against the door.

Q. That is what I mean. Did you have firm hold with your right hand, of anything?

A. No, sir, just resting against the door.

Q. Was there anything on the door you could take hold of with your right hand to steady yourself? A. No, sir.

Q. So your right hand was just resting up against the door like? A. Against the door.

(Testimony of Lewis B. Brown.)

Q. And then your left hand?

A. Was hold of this brake lever; that brake lever is made to lock back when it is in that position, to hold it firm against the end of the car.

Q. That brake lever doesn't seem to be higher than the grab-iron.

A. About the same as the top of it. They are almost the same as the top.

Q. It looks a little bit lower, if anything, to me. This one here is the brake lever; that piece along there, and this iron here is the handhold on the right. What is the fact as to whether this brake lever you speak of is higher or lower than [296—256] the grab-iron?

A. The two grab-irons are exactly the same height at the top. This brake lever is just the height of the top of that grab-iron, or the curvature of the grab-iron.

Q. Are they the same height?

A. Yes, sir; it is the angle the picture is taken in.

Q. You were standing with both your feet on the trap-door? A. Yes, sir.

Q. So you were just standing level?

A. Yes, sir.

Q. So both your arms would be in the same position, as far as height is concerned, from the floor?

A. No, the right arm was elevated.

Q. Wouldn't have to be, would it?

COURT.—It was in fact.

Mr. ROCKWOOD.—It was, though.

Q. You say it was? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. How much was it elevated?

A. I presume eighteen inches or more.

Q. It wasn't elevated enough to allow a man to be thrown under it? A. No, sir.

Q. Between you and— A. Well, yes.

Q. And the body of the car, was it?

A. As far as that goes, a man could be thrown under this arm.

Q. We are talking about the right arm now.

A. Yes, sir.

Q. Your right arm wasn't held up so high on the door a man [297—257] could be thrown under that, between your right arm and the body of the car, was it?

A. Not if he was standing upright, no.

Q. And Defendant's Exhibit "F," shows the vestibule with this door open. Is the trap open or closed there?

A. Open. See this line of the trap up here?

Q. In this picture it is open? A. Yes, sir.

Q. And that is looking right out from a side view of it?

A. Yes, sir, that is the ordinary position in the loading or unloading of passengers.

Q. This exhibit "G," that is the same thing except the trap-door is down?

A. Yes, sir, same thing.

Q. And this exhibit "H," that is the same, I take it, as the last picture, except that this trap-door—is that the trap-door? A. Yes, sir.

Q. On an angle there? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. It shows on this exhibit, that trap-door partially raised up? A. It is unlatched there.

Q. Unlatched, but not fully pulled up. And this Defendant's Exhibit "I," shows this vestibule door, shows more clearly than the rest, the way it is hinged, doesn't it? A. Yes, sir.

Q. And this shows what I was getting at a while ago? A. Yes.

Q. You could have had this door in the same position shown [298—258] in this photograph here, this Defendant's Exhibit "I," and have stood there in this opening between this side of the door and the back of the vestibule, couldn't you?

A. Yes, sir.

Q. And then looked from that point ahead along the train, and towards the engine, to make whatever observation you wished?

A. I could have, but it would have been kind of a dangerous position.

Q. Would have been dangerous to you?

A. Yes, for me.

Q. Would not have been dangerous for the passengers, though?

A. I presume not; not as dangerous, at any rate.

Q. And this Defendant's Exhibit "J," which is the last one, that shows the door again partially open, and an interior view. If you were opening it that way you would stand here, wouldn't you, and look out ahead forward? A. Yes, sir.

JUROR.—Now, as I understand, the train was going east, like that?

A. Yes, sir.

(Testimony of Lewis B. Brown.)

JUROR.—Did the door open around this way, or around this way?

A. Around this way. Like you would catch the door with your right hand and pull it back that way.

JUROR.—And you say you had hold of the brake lever with your right hand?

A. Left hand.

JUROR.—The right hand was against the door?

A. The right hand was against the door.

JUROR.—I *understood had* your right hand against the [299—259] brake lever, and your left hand against the door? A. No, sir.

JUROR.—The door opens into the car?

JUROR.—(Second one.) That is what I thought; I thought you said your left hand against the door, and I wondered how you could do it.

A. No, the right hand.

JUROR.—I understood the right hand on the brake lever and the left hand on the door, and I was wondering how that could be. That is all. I was getting at that.

Q. How long had you been standing out there before you felt someone, as you say, lightly touch you on the arm?

A. Oh, I don't know; I presume not over a minute; it is hard to judge the duration of time.

Q. You had been out there a minute or less, had you? A. Possibly, yes.

Q. It would be at least a minute?

(Testimony of Lewis B. Brown.)

A. I presume about that; about that length of time.

Q. Might have been longer than that?

A. Not much longer.

Q. So that for a minute of time then, while the train was in motion, the left hand vestibule door at the rear coach ahead of the observation car, was open? A. Yes, sir.

Q. And fastened back to the body of the car?

A. Yes, sir.

Q. And that condition existed at least for a minute?

A. Yes, I would judge not longer than that.

Q. And during all that minute the train was in rapid motion, wasn't it? [300—260]

A. It wasn't very rapid motion; I should judge about between fifteen and twenty miles an hour.

Q. Was going right along? A. Oh, yes.

Q. And was there any—did you have any lantern placed on the rear of that platform, a red light, to show a passenger who might be coming into that coach, that the door was open?

COURT.—Ask if he had a lantern there.

A. It is clear out of the practice—

Q. Just answer the question there, if you had one there or not.

COURT.—Did you have one?

A. Nothing but my white light.

Q. That was on your arm?

A. Yes, sir, was holding in the left hand.

(Testimony of Lewis B. Brown.)

Q. Holding in the hand? Then how could you take hold of this thing here, the brake lever?

A. Holding the lantern by the bail, over the hand, like that.

Q. You had the bail of the lantern, and your hand— A. Holding the brake lever.

Q. Holding the brake lever? A. Yes, sir.

Q. Didn't have it on your arm? A. No, sir.

Q. So that the light would be furthest in towards the brake lever, wouldn't it? A. Yes, sir.

Q. Would be over perhaps—

COURT.—That is enough; he has answered it once. You need not ask him about it again. He can't make it any stronger by answering it twice, than he can once. [301—261]

Q. Would be kind of hard, wouldn't it, for a man, if he were coming out of the observation-car, where the door is in the middle there, and undertaking to pass from the observation car to go forward, he would not see this white lantern in your hand there, would he? Wouldn't be likely to see it?

A. I don't know; the vestibules of the cars are almost as light as this room.

Q. I am speaking about the light itself, its own light. It would be tucked around there in a position where a person would not observe that?

A. Well, the light from our lanterns is nothing compared with the electric lights, as they dim them.

Q. I mean in the position which you held it. A person coming into the vestibule to go into the next car, would not be likely to see that light, would he?

(Testimony of Lewis B. Brown.)

A. Not be likely to, no.

Q. And you didn't have that light there for the purpose of being any warning to passengers, did you? A. No, sir.

Q. That was just for your own—

A. That is part of my working equipment.

Q. That is just for your own use? A. Yes, sir.

Q. Now, then, if I understand you, the particular work which you were going to finally do, would be to get off of that train when it went through the switch? A. Yes, sir.

Q. Of the siding? A. Yes, sir.

Q. Then you would close the switch?

A. Yes, sir. [302—262]

Q. And get on to the train? A. Yes, sir.

Q. And you would get on the train at that time at the rear end? A. Yes, sir.

Q. Now, while you were fixing, or closing this switch, the train would remain standing, wouldn't it? A. No, sir.

Q. It would not pull out and leave you?

A. Pull right on down into the clear.

Q. I know would pull in the clear; but I mean after it did clear, after it cleared the switch?

A. It would stop.

Q. It would stop? A. Yes, sir.

Q. And allow you enough time to close the switch?

A. Yes, sir.

Q. And then get on the car? A. Yes, sir.

Q. Else the train would go away and leave you. So if you had wanted to you could have gotten off

(Testimony of Lewis B. Brown.)

this train at this time at the rear of the observation-car, and closed your switch and gotten on at the rear end, couldn't you? A. Yes, sir.

Q. And in doing that you could, if you had wanted to, either opened up the back of the observation car, or have jumped over the rail, as you finally did? A. Yes, sir.

Q. Was this rear end so constructed that you could open up the iron railing there at the left side on the rear? A. Yes, sir. [303—263]

Q. And did it have steps and a trap-door there? A. Yes, sir.

Q. Leading down to the ground? A. Yes, sir.

Q. The same as the rear of this coach ahead did?

A. No, sir, the same as the forward end of the observation.

Q. I beg your pardon?

A. The same as the forward end of the observation-car.

Q. And it had how many steps there at the rear?

A. The same number of steps as the forward end; I couldn't tell you; four, I think.

Q. And an opening there in the railing so you could open it up? A. Yes, sir.

Q. So you could have, if you wanted to, gone back to the rear of the observation-car, and without opening the door, have looked along the track?

A. Yes, sir.

Q. And if you had wanted to get off you could have opened the door? A. Yes, sir.

Q. And gotten down there? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. Isn't that what the rules said you should do? Counsel has asked about the rule?

Mr. ROCKWOOD.—Just a moment. I object to that as calling for an interpretation of the rule.

Mr. DIBBLE.—I want to ask the same thing you did.

Mr. ROCKWOOD.—I object to asking what the practice was; you can ask what the rule is, I have no objection to that.

Q. I will ask you if the printed regulation isn't that you should occupy at the night-time always the rear end of the train? [304—264]

A. During the night—

Q. At night-time I mean.

A. During the night hours—

Mr. ROCKWOOD.—Just a moment; the rule is the best evidence, and is already in evidence. I have no objection to asking if that is the rule.

A. Yes, sir.

Mr. ROCKWOOD.—As now in the record.

Q. And you were violating this rule then, were you? A. No, sir.

Mr. ROCKWOOD.—I object to that as calling for the opinion of this witness.

COURT.—That is his opinion, whether he did or not. Tell what he did, and where he was.

Q. I understand for a time you did ride there in the rear end, in the rear car or compartment somewhere; before you went up to open the door you were riding in the rear car, the observation-car, were you?

(Testimony of Lewis B. Brown.)

A. Your Honor, can I tell him the way—the build of the observation-car?

COURT.—Yes.

A. For your information, the build of the observation-car of the Great Northern, as you come into it from the front end, is the toilet, then you come to the smoking-room, and then there is a drawing-room and two compartments, and then what we term the parlor end of the car, and that is where I was riding; in the parlor end of the car prior to the accident.

Q. You were clear then to the rear end?

A. Clear to the rear of the car; yes, sir. [305—265]

Q. You were nearer to the rear of the observation-car than you were to the back end of this forward coach? A. Yes, sir.

Q. And after the accident occurred, did you open up the train at the back? A. No, sir.

Q. You went over the railing?

A. Over the railing, yes, sir.

Q. And as you stood there at the back of this coach just ahead of the observation-car you were—up to the time you felt somebody touch your arm, you were leaning out, weren't you? A. Yes, sir.

Q. And you were looking towards the engine?

A. Looking forward, yes.

Q. Along the train? A. Yes.

Q. So you had your back all during that time to the vestibule? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. And you couldn't see if anybody was in there or not? A. No, sir.

Q. And there was nobody else there helping you?

A. No, sir.

Q. No other man there. A. No, sir.

Q. And now then, did you say that while you were standing in that position someone just walked up and very lightly took hold of your arm?

A. They didn't take hold of my arm; they just laid their hand on my arm, like that.

Q. Just like you might do there now?

A. Yes, sir.

Q. Just like I am walking up and laying my hand? [306—266]

A. Just like you might put your hand on my arm to attract my attention.

Q. Which arm was that?

A. It was my right forearm near the wrist.

Q. Somebody just touched your right arm?

A. Just laid their hand on my arm.

Q. As you had that up against the door?

A. Yes, against the door.

Q. That caused you to turn around, didn't it?

A. Yes, sir.

Q. I suppose you swung right around towards your right, didn't you?

A. I just dropped my arm and turned to look to see who it was.

Q. Did you still keep hold with your left hand of the brake lever? A. Yes, sir.

Q. And your lantern? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. You still kept hold there? A. Yes, sir.

Q. And just turned to your right, like this?

A. Yes, sir.

Q. And then you saw Mr. Shellenbarger, didn't you? A. I saw someone walk right by me.

Q. You saw somebody there. How many steps did he take? A. I would judge about two steps.

Q. So when they started towards you, they must have been several feet away from you?

A. Couldn't have been and lay his hand on my arm.

Q. I mean from the time they started towards you; if they took [307—267] two steps, two ordinary steps?

A. Would take two ordinary steps over to the edge of the platform. The second step may have been off the platform. He just stepped off the platform.

Q. Did you see him take two steps?

A. I don't know; I would judge took about two steps.

Q. You would not say you saw him take two steps?

A. He walked right off the platform; no fall, or nothing; he just walked off.

Q. And he came up and touched you on the hand?

A. Yes, sir.

Q. How fast was the train going at that time?

A. I have answered that question once, if you please.

COURT.—Two or three times; three or four times.

(Testimony of Lewis B. Brown.)

Mr. ROCKWOOD.—Go ahead and answer it again.

A. Any place from fifteen to twenty miles an hour, I should judge.

Q. Was there any opportunity for you to save this man from falling, if that is the way it occurred?

A. I grabbed at him, but I missed him.

Q. If he was just walking, just stepping there, couldn't you stop him from going off that train?

A. I tried it, and couldn't; yes, sir.

Q. Isn't it a fact that he—that this touching of your arm—that that touching was a throwing that struck your arm with great force?

A. No, sir.

Q. That that is what you felt?

A. No, sir; was just ordinary—

Q. Was thrown through the air and struck your arm? [308—268]

A. Just as though you would want to attract someone's attention, and just lay your hand on their arm, or their shoulder; you have done that.

Q. That is all there was to it?

A. That is all.

Q. You didn't think at that time, then, anybody was going to fall off the train, did you?

A. No, sir.

Q. Just thought somebody wanted to ask you a question, or something?

A. The natural inference that one would make, that it would be one of the train crew.

Q. When this hand was lying on your arm im-

(Testimony of Lewis B. Brown.)

mediately you didn't think anybody was in danger at all? A. No, sir.

Q. Because had you, you could easily have saved this man, then, couldn't you?

A. I could have held my arm there, sure, and saved him.

Q. Now, then, with the train going twenty miles an hour, when this man stepped off you would not have much view there at night along the ground, would you?

A. The lights from the car windows, from the windows of this car. The car was fully lighted, and makes plenty of light for you to see until possibly ten feet back of the observation-car; possibly more, fifteen feet possibly.

Q. And you say from the time this man stepped off the train going twenty miles an hour, that you actually saw him on the ground there on that right of way? A. Yes, sir.

Q. For how long a period of time did you see him? [309—269]

A. Until the lights of the train had passed; I don't know.

Q. You went by him right away, didn't you? You were shooting right along, twenty miles an hour? A. Yes, sir.

Q. You didn't have very much view of him, did you? A. Full view.

Q. And you saw just how he landed?

A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. Could you tell with which foot he landed on the ground? A. He landed on both feet.

Q. Both feet at the same time?

Q. Yes, apparently both feet at the same time; and the momentum of the train carried him until he sat down.

Q. Did you see him slide, this one foot you mentioned? Did you see him slide this one foot?

A. No, sir.

Q. Why not.

A. You couldn't with—you couldn't tell back that distance whether any object slides or not when it is by you.

Q. If you saw the man there on the ground for any appreciable time you could certainly see him right there when he slid at the beginning, wouldn't you? You saw him when he struck the ground you say, didn't you? A. Yes, sir.

Q. Wouldn't he slide right away if going to do any sliding?

A. No, he sat right back, and then straightened right out.

Q. Did you say anything to him when he touched you on the arm? A. No, sir.

Q. Did you say "Don't go this way," or "Don't go through here?" [310—270]

A. Didn't say a word, had no opportunity.

Q. If the rear vestibule had been open, there wouldn't have been much opportunity—there wouldn't have been much likelihood of hurting anybody if the train remained standing there?

A. How was that?

(Testimony of Lewis B. Brown.)

Mr. ROCKWOOD.—I don't understand that question.

COURT.—What do you mean by that?

Mr. ROCKWOOD.—Standing where?

Mr. DIBBLE.—If I understand the witness, he is undertaking to give a reason as to why he had to make his observation or use the rear of the coach ahead, and I am trying to develop by him to see if there is any real ground for that; if he couldn't have done everything from the rear of the vestibule without endangering the passengers in any way.

Mr. ROCKWOOD.—He explained what he did. Now, if his judgment was poor, I don't think the witness should be asked about that. Just explain why he did it, or something.

Q. Did you have a view of this man's face as he came forward to you, or touched you? Did you see his face at all before he fell from the train?

A. He walked by me. When I dropped my arm he was walking; just stepped right off; and I had no view, only saw a man.

Q. Did you notice if he had glasses on or not?

A. I couldn't tell.

COURT.—He said he didn't see his face. How could he tell whether he had glasses on or not.

Q. What was Mr. Shellenbarger's condition when you saw him lying there on the right of way when you went back there? A. Unconscious?

Q. Did you notice if his head was bleeding?
[311—271] A. How is that?

(Testimony of Lewis B. Brown.)

Q. Did you notice if his head was bleeding?

A. No, I didn't. There was one of the men had him—was supporting his head and shoulders when I got up there; trying to make him as comfortable as possible.

Q. And then how did you get back to the train?

A. Walked back.

Q. And did you walk back with Mr. Cornell?

A. I don't know; I walked back with someone.

Q. Did you walk back with one of the men that had run up there from the rear of the train?

A. Yes, it was one of the passengers that I walked back with.

Q. And do you know whether you were the first one to get off the train, or not? A. Yes, sir.

Q. You were the first one? A. Yes, sir.

Q. And did you see Mr. Stuart? You have been here during the trial; didn't Mr. Stuart get off first—this man; isn't that the first man that got off the train?

A. No, sir, I was the first man off the train; I think—I wouldn't say for sure, but I think Mr. Stuart, the gentleman there, was the man who passed me when I was walking, and took the lantern.

Q. Mr. Cornell, will you stand up? Do you remember seeing that man there? A. Yes, sir.

Q. Did you get off before him, or after him?

A. I was the first man off the train. [312—272]

Q. Now this Mr. Cornell, the second man that

(Testimony of Lewis B. Brown.)

stood up there. I will ask you if he isn't the man that you walked back with? A. I don't know.

Q. Did you walk back with more than one man?

A. I don't know; there was I think two or three men in the party that walked back; I don't know.

Q. And you walked back along the right of way, didn't you?

A. Walked back on and between the two tracks.

Q. And now then, after this accident occurred, you went through the train, and what did you say to these other people on the train?

Mr. ROCKWOOD.—Just a moment, I don't think that is proper.

COURT.—You can ask a definitely impeaching question, that is all.

Mr. DIBBLE.—I am not trying to; I just asked him to say again what he said at that time.

Mr. ROCKWOOD.—I think that is immaterial.

Mr. DIBBLE.—You asked what he said.

Mr. ROCKWOOD.—No, I never asked him what he said; I never asked about any conversation he had.

Mr. DIBBLE.—I thought you asked him if he wasn't the man that made the announcement?

Mr. ROCKWOOD.—Oh, sure; I didn't understand you.

Q. You were asked on direct examination if you were the very brakeman that came through the train after Mr. Shellenbarger fell, and made some statement that a man had fallen. You are that man, are you?

(Testimony of Lewis B. Brown.)

A. I beg your pardon. You mean the train crew?

COURT.—Yes.

A. Yes, sir. [313—273]

Q. What did you say when you came through the train?

A. One of the Sir Knights has fallen off.

Q. Is that the language you used?

A. I don't know whether that is the exact language it was; more than likely it was.

Q. Did you say to anybody at that time, that a Sir Knight had stepped off the train, or walked off the train?

A. Now, I don't know whether I did or not, but it is virtually the same thing.

Q. That is a matter for the jury; we will discuss that later. Now, then, in walking back from the place where Mr. Shellenbarger was on the right of way, were you asked or did you talk with any of the Sir Knights, as to how the accident happened?

A. I may have.

Q. Very likely you did? A. May have.

Q. I will ask you if it is not a fact that as you were walking back from the place where you found Mr. Shellenbarger, to the train, I will ask you if you were not asked by Mr. Cornell, how the accident happened? A. I may have been.

Q. Or how this happened, how this man was injured? And that you replied in substance that the man fell through the vestibule and struck your arm?

A. No.

(Testimony of Lewis B. Brown.)

Q. And you grabbed for him, but couldn't stop him? A. No, sir; no, sir.

Q. I may not have just exactly like you said it, because it is hard to get it; but I am trying to state as near as I can that [314—274] you said in substance to this man, instead of saying he stepped off the train, or walked off the train, you said to this man in substance, that Mr. Shellenbarger had been thrown? A. No, sir.

Q. And fell through the vestibule and struck your arm?

A. No, sir, I never made that statement.

Q. You didn't make any statement of that kind?

A. No, sir.

Q. Or anything like that? A. No, sir.

Q. Or anything to that effect? A. No, sir.

Q. I will ask you if, subsequent to this accident, you didn't make a similar statement to Mr. Stuart?

Mr. ROCKWOOD.—Fix the time, please.

Mr. DIBBLE.—(To Mr. STUART.) What time would that be you had the conversation?

Mr. STUART.—After I got on the train.

Q. After Mr. Stuart got back on the train, and while this witness was on the train.

Mr. STUART.—Yes, we were all on the train.

Q. I will ask you if Mr. Stuart, the gentleman who has just gotten up, didn't inquire how this accident happened, and if you didn't state to him that Mr. Shellenbarger fell through the vestibule

(Testimony of Lewis B. Brown.)

and struck your arm, and broke your hold, and you grabbed for him and couldn't save him?

A. No, sir.

Q. Or words to that effect? A. No, sir.

Q. I will ask you if it is not a fact that you at no time told either of these men that Mr. Shellenbarger walked off [315—275] the train?

Mr. ROCKWOOD.—That is not proper impeachment.

Redirect Examination.

(Questions by Mr. ROCKWOOD.)

Just so there will be no misunderstanding as to your testimony, when you came up preparatory to looking out of the train, before this accident happened, was the vestibule, which is the rear of the last Pullman car of the train, was that in any way open? A. No, sir.

Q. And was there any opening in it until you opened the door? A. No, sir.

Q. Now, Mr. Brown, let's see just one of these pictures. I show you this Exhibit "J," which is a picture with the door ajar. If the door were in that position, and you had your body inside of the vestibule, and your head out through that opening, would you be able to observe the forward end of the train, and see the locomotive?

A. I don't think so; no, sir.

JUROR.—What was that question?

Mr. ROCKWOOD.—If his body was inside, and his head sticking out there, would he have been able to see up alongside of the train?

(Testimony of Lewis B. Brown.)

A. I don't think so.

COURT.—You mean, walk out on the platform.

Mr. ROCKWOOD.—No. His body inside, and his head outside. His feet and body on the inside, on the platform, and his head through the opening?

JUROR.—The platform, or the trap? I would like to know. [316—276]

Mr. ROCKWOOD.—I say, inside the vestibule. I will put it, as that picture shows.

COURT.—Standing in the vestibule, not on the trap.

Mr. ROCKWOOD.—If he were standing with his body inside the vestibule, with his head stuck out through this opening which I am pointing to in this exhibit, would he be able to see up alongside the train to the engine?

JUROR.—Are you assuming that he would stand on the trap?

Mr. ROCKWOOD.—As that picture shows, that would be just about it, inside the edge of the trap.

JUROR.—I want to ask the question, was the door in that position, or was it clear open?

Mr. ROCKWOOD.—The door was clear open, as he has testified very directly.

JUROR.—If he was standing on the trap, could he see ahead then?

Mr. ROCKWOOD.—I was going to ask that.

Q. To see ahead with the door in approximately that position, you would have to have your body on the outside of the door, standing on the trap?

(Testimony of Lewis B. Brown.)

A. Yes, and holding the front grab-iron, and it would be a dangerous position.

JUROR.—How far from the switch, west of the switch, was it when you opened the door?

A. Right at a mile.

JUROR.—Where?

A. Right at one mile west.

JUROR.—Why did you open at that distance from the switch? What is your custom? Your opening of the door, as I understand it, is to get off when the train has got into the [317—277] siding, close the switch, and then walk around the back end and signal to the engineer to go ahead. Isn't it?

A. There is no specified distance where we shall open the doors, but we have a rule that compels us to get off on the opposite side of the track from the switch.

JUROR.—I was wondering why you opened it so far away from the switch, when there was no necessity of opening it until you got to the switch?

A. Well, we had a slow order, and it was to observe the movement of the train, and the general conditions.

JUROR.—You say it was about a mile back from the switch?

A. About a mile; yes.

JUROR.—They had not stopped for the switch, of course.

A. Oh, no, no.

COURT.—What was your first duty, now, when

(Testimony of Lewis B. Brown.)

this train approached the switch? What was the first duty you had to do?

A. My first duty is to get off and close the switch.

COURT.—Then you do that after the train stops?

A. No, no, drop off the train as it passes the switch.

COURT.—After it runs in on the switch?

A. No, as it passes on. When the train is coming in, like the switch is here, and the train passes the switch, I drop off on the opposite side of the track from the switch.

COURT.—This train was going on the siding?

A. Yes, sir.

COURT.—You mean, after the train turns in on the siding?

A. Yes, sir. [318—278]

COURT.—Then you drop off?

A. Yes, wherever I am located on the train, I drop off.

COURT.—Then there was no necessity of your dropping off the train until it passed in on the siding?

A. Until I came to the switch; but it was my duty to see where I could—be at my position of duty so I could drop off when the time came.

COURT.—The train stops before it enters the switch?

A. Yes, sir.

COURT.—After the front brakeman has opened the switch?

(Testimony of Lewis B. Brown.)

A. Yes, sir.

JUROR.—No occasion for you to get off the train until it gets into the siding and you get off at the switch and close the switch on the opposite side from the engineer?

A. Not necessarily opposite from the engineer; but I get off by the switch as the train pulls by, on the opposite side of the track from the switch.

JUROR.—But you don't get off until the rear coach, which you are supposed to have been in—you don't get off until that has either reached the switch or passed through it?

A. Until it reaches it; yes, sir.

JUROR.—As I understand, you opened this door a mile or more prior to that; and I can't understand why you did that, as long as it wasn't necessary, and the train moving at that rate of speed.

A. We don't consider twenty miles an hour very fast speed, if we were going twenty, and the train was slowing down, and I was in position in case we stopped there. You never know on a slow order when you are going to stop, and I was in position, [319—279] if necessity required it, to drop off.

JUROR.—Could you drop off without opening the trap?

A. Yes, sir.

JUROR.—How many feet *if* the trap above ground?

A. There is a grab-iron on each side, and we can get hold of this and get to the bottom step and stand on that, and pull the door shut on this style of Pull-

(Testimony of Lewis B. Brown.)

man car, when we get off. That leaves your door in normal position.

JUROR.—I want to ask another question. I have watched switchmen with more or less frequency, where they are taking siding, and they don't get off until—the rear brakeman doesn't get off until they get onto the siding, then he throws the switch and goes around and signals to the engineer.

A. Yes, sir.

JUROR.—If you get off any distance back of the switch you would have to walk to the switch before you could close it?

A. Yes, sir.

JUROR.—Ordinarily then, to save walking and delay of walking, you get off at the switch?

A. At the switch, on the opposite side of the track from the switch.

JUROR.—But that was the practice, to get off at the switch?

A. Yes, sir.

JUROR.—That is the time you open the door. You didn't open the trap?

A. No, sir.

JUROR.—You opened the door about a mile back?

A. Yes, sir.

JUROR.—Of where it was necessary to have it open so [320—280] you could get out of the car and perform your duties?

A. Opening that trap put me in position to per-

(Testimony of Lewis B. Brown.)

form my duty in case the train stopped before we got to the switch. My duties require me to go back and protect the rear of the train; as soon as it is stopped, proceed back with the proper equipment to stop any following train.

COURT.—Did you know this train was going to take the siding?

A. Yes, sir.

JUROR.—Wouldn't it, as a matter of fact, been soon enough to open that door when the train stopped, when the front end of the train got to the switch and stopped to open the switch, wouldn't that be soon enough to open the door?

A. Well, close to the switch, yes, sir.

JUROR.—Because you had the full length of the train to go in before you needed to get off.

A. Yes; but we are supposed to be at our position of duty, where we can perform our duty at any time; between the stations, or any place.

JUROR.—You could have been just inside the door, and when the train stopped you would know stopped to open the switch, and then open the door, and as the train was coming back and coming to that switch, you would have had plenty of time to open the door and get off?

A. Yes, sir.

JUROR.—Your duty is to close the switch?

A. Yes, sir, that is one of them.

JUROR.—Now, could you perform it any better by getting the door open a mile back, than you could to open the door [321—281] at the time your

(Testimony of Lewis B. Brown.)

train got on the siding? Or, to put it another way, as Mr. Ross asked you, when the engine comes to the switch and the front brakeman, the head brakeman, opens the switch, if you got off then would you leave the door open and then walk the entire length of the train in order to perform that duty of closing the switch after the train got on the siding; or really, was there any necessity, then, of your opening the door until the train did get on the siding?

A. Well, as it turned out, no. But when the train slowed down I wasn't figuring on the switch then, because I knew we wasn't to it by a mile; but I was figuring on protecting the train as flagman.

JUROR.—Against what?

A. Anything. We never know when there is a train following. We never know when there is a train following us, or how close they are.

JUROR.—You say you have a block system there?

A. Yes, sir.

JUROR.—Wouldn't the block indicate if there were a train? When you are in the block, under your rules, wouldn't that flag that train automatically in the rear?

A. No, sir.

JUROR.—It does not?

A. The flagman must protect his train regardless.

JUROR.—I know that; but the engineer of the

(Testimony of Lewis B. Brown.)

oncoming train—the block would indicate danger ahead, would show a red light, wouldn't it?

A. If it was working, yes.

JUROR.—If your train was in that particular block?

A. Yes, sir. [322—282]

JUROR.—And the oncoming train, coming up to that block, then his orders would be to slow down?

A. Yes, sir.

JUROR.—So you could flag ahead?

A. Yes, sir; but our orders are not to depend on the blocks, because we never know whether they are working or not.

JUROR.—In this particular case, when you were coming onto the siding for a train coming from the opposite direction, there wouldn't have been any possibility of a train coming from the rear, would there?

A. I don't know.

JUROR.—How could it, if a train was coming from the opposite direction, and going to meet you there. Couldn't be one coming the opposite way.

A. Might have been half a dozen following. We were running as a passenger extra, and we had a positive meet at Saco; and might have been a dozen other trains had the same meet.

Recross-examination.

(Questions by Mr. DIBBLE.)

Which side did you say it was that Mr. Shellenbarger fell past you, the right side of you? Was

(Testimony of Lewis B. Brown.)

it? Stepped past you on the right side, or the left side?

A. Passed me on the right side.

Q. Passed you on the right side? A. Yes, sir.

Redirect Examination.

(Questions by Mr. ROCKWOOD.)

Now, Mr. Brown, if the train had stopped there at the switch, and had stopped for any appreciable time, [323—283] would you have dropped off that train to protect the rear end?

A. Yes, sir.

Q. So there was a possibility of your having to get off the train before the car reached the switch—before the rear car reached the switch, was there not? A. Yes, at any time.

Q. In railroad practice, does the Great Northern ever depend on someone else to keep the train safe so the flagman does not go out back?

A. No, sir, it is up to the flagman.

Q. Those are positive directions when the train is standing, is that true? A. Yes, sir.

JUROR.—Do you do any flagging at the rear end without a signal from the conductor or engineer?

A. Yes, sir.

JUROR.—You do?

A. Yes, sir.

JUROR.—Well, I don't know what the practice is on the Great Northern, but usually a flagman—

COURT.—Is that all with this witness?

JUROR.—There has been a lot of talk about

(Testimony of Lewis B. Brown.)

opening the door a mile ahead. Don't you open the door, not for the purpose of getting down and throwing the switch, but in case of an emergency through this section of the track that had this slow order?

A. Yes, sir.

JUROR.—That was the reason you opened it a mile ahead of time?

A. Yes, sir.

Witness excused.

Defense rests. [324—284]

TESTIMONY OF WALTER L. CORNELL, FOR
PLAINTIFF (RECALLED IN REBUT-
TAL).

WALTER L. CORNELL, recalled in rebuttal, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Cornell, you have already been sworn. I will ask you to state to the jury whether or not, after the accident occurred, and while you were walking back from the place where Mr. Shellenbarger was picked up, you had a conversation with the forward brakeman of the train, with regard to how the accident occurred? Just state whether or not you had any conversation with him?

A. I did.

Q. And state whether or not you inquired of him what had happened, or how the accident occurred?

(Testimony of Walter L. Cornell.)

A. I asked him that.

Q. I will ask you if he didn't state to you at that time that Mr. Shellenbarger fell through the vestibule and struck his arm, and that he reached for him to grab him, but couldn't catch him. Or words to that effect? A. He did.

Q. Do you remember just exactly what he did say in that respect?

A. I think I can quote his very words.

Q. Just do it, if you will, please.

A. I asked him how the accident occurred, and he said that he had the door open, and that a man fell against his arm, "And I grabbed for him, but I couldn't save him." [325—285]

Q. State whether or not he told you at that time that the plaintiff walked past him, or stepped from the car?

Mr. ROCKWOOD.—That is improper impeachment.

Mr. DIBBLE.—That is all, Mr. Cornell.

No cross-examination.

Witness excused. [326—286]

TESTIMONY OF D. B. STUART, FOR PLAINTIFF (RECALLED IN REBUTTAL).

D. B. STUART, recalled in rebuttal by the plaintiff, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Stuart, I will ask you to state whether or not

(Testimony of D. B. Stuart.)

you had any conversation after the accident, and after you had gotten back to the train with the rear brakeman in regard to how the accident happened?

A. I did.

Q. State whether or not you inquired of him how it did occur? A. I did.

Q. I will ask you if he didn't at that time state to you, there on the train that Mr. Shellenbarger fell through the vestibule of the car, struck his arm, and that he grabbed for Mr. Shellenbarger, and couldn't save him; or words to that effect? A. He did.

Q. Can you repeat exactly any nearer what he did say?

Mr. ROCKWOOD.—Just a moment.

Mr. DIBBLE.—I withdraw that.

No cross-examination.

Witness excused. [327—287]

TESTIMONY OF W. G. SHELLENBARGER,
FOR PLAINTIFF (RECALLED IN RE-
BUTTAL).

W. G. SHELLENBARGER, plaintiff, recalled in rebuttal, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Shellenbarger, you have heard the testimony of the rear brakeman with respect to how he says the accident occurred? A. Yes, I did.

Q. I will ask you to state what the fact is as to whether you walked or stepped from the train?

(Testimony of W. G. Shellenbarger.)

Mr. ROCKWOOD.—I object to that as improper rebuttal.

COURT.—You covered that on direct examination.

Mr. DIBBLE.—Was it covered, the other time?

COURT.—I think you did.

Mr. DIBBLE.—I remember he said, of course, that he was thrown, but if it is understood we deny what the brakeman says.

Mr. ROCKWOOD.—I don't think you understand. I tried to avoid that on direct examination, because it is an affirmative matter.

COURT.—Very well.

Q. In the affirmative answer. In their answer in this case it is alleged that you walked or stepped from the train. State whether or not that is true.

A. It is not true.

Witness excused.

Plaintiff rests. [328—288]

Mr. ROCKWOOD.—The defendant at this time moves the Court for a directed verdict in its favor on the ground that there is no evidence of any excessive speed, and no evidence of any excessive or unusual lurch of the train; on the further ground that the evidence fails to prove it was negligent in any particular alleged with respect to the condition the vestibule as to lights, opening, or method of safeguarding the vestibule; that there is no evidence from which it can be determined that any alleged act of the defendant was the proximate cause of plaintiff's injury—of the accident and his resulting injury. And further that the evidence

shows that plaintiff was guilty of contributory negligence and that such negligence was the proximate cause of the accident.

Objection overruled; exception saved.

Whereupon proceedings herein were adjourned until Monday, December 15, 1930, *a* P. M. [329—289]

Portland, Oregon, Monday, December 15, 1930.

[Title of Cause.]

INSTRUCTIONS OF COURT TO JURY.

R. S. BEAN:

Gentlemen of the Jury, you have heard the evidence in this case and the testimony from the lips of the witnesses and the argument of counsel, and you are therefore in possession of the facts as disclosed by the witnesses, the interpretation and application of the facts as made by counsel, and it now becomes the duty of the Court to advise you, or state to you the rules of law by which you are to be governed in arriving at your verdict. In the trial of a case of this kind the Court and jury have separate functions to perform. It is the duty of the Court, and the exclusive duty of the Court to pass upon all questions of law. The Court has no more right to invade your province than you have to invade its, and therefore it is incumbent upon you to take the law of the case as it is stated to you by the Court, and to apply to that law the facts as you understand them, as developed by the testimony in this case.

Now, in an action of this character, it is incumbent upon the plaintiff, or the person bringing the

action, to state in his complaint, or the first paper filed, the facts upon which he seeks to recover. In other words, he is required to state in his complaint the facts which he alleges [330—290] to have been negligent on the part of the defendant company, and which he claims was the cause of his injury. The purpose of this rule is twofold, first to inform the defendant of what is charged against him, so that he may come into court prepared to meet the charges, and second, to advise the court and jury of the issues they will be called upon to determine.

Now, in conformity to this *to this* rule, the plaintiff in this case, Mr. Shellenbarger, has stated in his complaint that the defendant company was negligent in two particulars. First, it is said that the train upon which he was riding at the time of his injury was negligently and carelessly operated at a high and excessive rate of speed, and so carelessly and negligently operated that it was thereby caused to sway and give an unusual and extraordinary and unnecessary and unduly violent lurch, thereby causing him to be thrown from the train. That is the first charge of negligence in the complaint. The second is that the train was negligently and carelessly operated because an employee of the defendant suffered and permitted the train to be in an unsafe condition, and dangerous to passengers in that the vestibule door was open, and that by reason thereof plaintiff was thrown from the train and injured.

Now the defendant company admits that the plaintiff was a passenger on a train being operated

by and under its control. It deines that the train was carelessly and recklessly operated or that its operation caused the injury to the plaintiff. It admits that the vestibule door was open, but it alleges that it was opened by an employee in the regular operation of the train, and that the plainiff, through his own negligence and carelessness, walked [331—291] through the opening and received the injuries complained of. In other words, it is charged in the answer that the fall and injury of the plaintiff was caused solely by his contributory negligence in that just prior to the time of the injury an employee of the defendant, in the regular discharge of his duties in connection with the operation of the train and in the exercise of due care for the safety of the train and passengers, had opened a vestibule door on one side of the train, and that the employee was standing at said open door for the purpose of observing the movement of the train and assisting in the operation thereof, and that while he was so standing in the opening, and without any warning to him, and without any knowledge on the part of the employee of the intention of the plaintiff, the plaintiff proceeded from the vestibule and fell to the ground and sustained certain injuries. In other words, the defendant alleges that this injury that the plaintiff received was due to his own carelessness and negligence, or, in other words, was due to want of due care on his part. And in orderly consideration of this case, it seems to me that this is probably the first question for this jury to determine, because if this injury was due to the carelessness and negligence of Mr. Shellenbarger, then he is not entitled

to recover, regardless of whether the railway company was negligent or not, and so in an orderly consideration, I would suggest that you consider that question first.

The burden of proof is on the railway company to show that the plaintiff was negligent and that this accident or injury was due to his own negligence. Now, he had a perfect [332—292] right under the law to pass from one car to another, and he had a right to assume, in doing so that the conditions were such that he could *dafely* make that journey, but in doing that he was required, as any passenger on a railway train is, to exercise due care for his own safety, and to look where he was going, and observe the conditions as he found them, and if he negligently and carelessly fails to do so, and is injured he has no good reason to complain against the railway company.

Now, if you think from the preponderance of the evidence that this accident or injury to Mr. Sheltenbarger was due to his own carelessness or negligence in walking out through the open vestibule door, then this case is at an end, and your verdict should be for the defendant. But if you do not so find, or do not so believe, then it will be necessary for you to proceed and consider the other questions in the case.

Now, it is admitted that the plaintiff was a passenger on a railway train operated by and under the control of the defendant. The law therefore imposes upon the railway company a certain duty. It was not an absolute insurer of the safety of the passengers. It did not guarantee absolutely that he

would not be injured, but the law did require it to exercise the highest degree of care for his safety as foresight and prudence may suggest consistent with the practical operation of the train, taking into consideration the circumstances existing at the time and prior to the accident, and if it violated the rule in either one or more of the particulars alleged in the complaint, and the plaintiff himself was not guilty of contributory negligence, then the plaintiff would be entitled to recover. [333—293]

Now there are, as I said, two grounds of negligence charged in the complaint. It is not incumbent upon the plaintiff to prove both of them; either may be sufficient if he proves it by a preponderance of the evidence. The burden of proof is on the plaintiff to sustain either one or both of these allegations of negligence. And by burden of proof, I simply mean that he must make out the best case upon these questions.

Now, first, regarding the alleged reckless and careless operation of the train. It was the duty of the defendant to operate the train with reasonable care, and not to operate it recklessly or cause extraordinary and violent lurches, thereby endangering the safety of its passengers, and therefore if you believe from a preponderance of the evidence that the defendant negligently operated the train in causing it to give extraordinary lurches, it was negligence, and if such negligence was the proximate cause of plaintiff's injury, if, as he says, he was thrown from the train, then the plaintiff would be entitled to recover unless the defendant has satisfied you, by a preponderance of the evidence, that the

plaintiff himself was guilty of contributory negligence.

Now, of course the movement of passenger trains in the manner required by modern demands is such that some swaying and jarring and lurching of the train is unavoidable, and the railroad company is not responsible for an injury to passengers that may result from such usual swaying and lurching, but it is responsible for injury to a passenger from unnecessary and violent operation of the train. [334—294]

The second charge in this case is that the vestibule door was negligently and carelessly opened by an employee of the defendant company, and when I say by the defendant company I mean by someone of the persons in charge of the train. It is admitted that this train on which the plaintiff was riding is what is known as a vestibule train. The object of such vestibule with which the train was equipped is for the comfort, safety and convenience of the passengers, so he may pass comfortably, safely and conveniently from one car to another. The vestibule door, therefore, should not be open, but should be kept closed while the train is in motion, unless it is impossible to do so in the practical operation of the train, and it is a question of fact in this case whether or not the opening of this vestibule door by the brakeman was necessary in the practical operation of the train. If it was, then it was not negligence to open it; if it was not, then it was, and if the opening of the door was the proximate cause of the injury to plaintiff, then he would be entitled to recover.

There has been something said about the rules of the company covering the duty of the rear brakeman. These rules were made and promulgated by the company for the government of the conduct of its employees, but a violation of the rules would not entitle the plaintiff to recover in this case unless such violation was the proximate cause of his injury. Whether it was or not is a question of fact for you to determine from the evidence. The question is, was it negligence and carelessness on the part of the brakeman to open the vestibule door at the time he did, and at the place he did, and if so, was that the proximate cause of the plaintiff's injury? [335—295]

That, I think, covers all the questions of law that are involved in this case except one regarding the measure of damages. If you conclude that the plaintiff is entitled to recover, then it will be necessary for you to determine in your verdict and state by your verdict the amount of money he is entitled to. There is no hard-and-fast rule the court can give you by which you are to determine that question. If the matter involved in this case was property which had a market value we could arrive at some reasonable estimate of the recovery, but when it comes to fixing compensation for injury to a human being there is no fixed rule of law. The object to be attained is, of course, just and fair compensation, but the amount thereof must, after all, be left to the good judgment and sound discretion of the jury. In determining that question you should take into consideration the nature and character

of the plaintiff's injury, whether it is temporary or permanent, the loss of time, the loss of services, loss of earnings, if any on account of the injury, and from all that determine what you think is a just and fair compensation that the defendant company should pay him for this injury in case you find that he is entitled to recover.

Now in addition to the general damages, which are said in this case to be fifty thousand dollars, and of course your verdict under no circumstances could exceed that amount, but in addition the plaintiff has asked for special damages, that is he has alleged that he was put to expense of seven hundred dollars for hospital fees, and for nurses; if he is entitled to recover at all, he is entitled to recover whatever may be reasonable on that subject not [336—296] exceeding seven hundred dollars; he is also asking seven hundred and fifty dollars as special damages for medical attendance, and you heard the testimony on that subject, and it is for you to say the amount he is entitled to, if you think he is entitled to recover at all. He is also asking for thirty dollars for examination and treatment of his eyes which he claims was due to and caused by this accident. These are the three items of special damages which he would be entitled to recover in addition to the general damages, in case you think he is entitled to recover at all.

Now, Gentlemen, the questions in this case are largely questions of fact, and they are for your determination. You are the exclusive judges of all questions of fact. You are the exclusive judges

of the credibility of the witnesses. Every witness is assumed by law to speak the truth. This, however, may be overcome by the manner in which the witness testifies, by his or her appearance on the witness-stand, or by contradictory testimony, or by evidence showing that they made statements out of court inconsistent with their present testimony.

Now, there was some evidence in this case tending to show that the brakeman is alleged to have made some statements to some of the passengers on the train that it is claimed were inconsistent with the testimony he gave on the witness-stand. That testimony was admitted simply for the purpose of enabling you to more accurately determine the weight to be given to his testimony here on the witness-stand, and it was not admitted for the purpose of showing that the statements he made out of court, if he made them, were in fact the truth [337—297] but simply for the purpose of showing that he contradicted himself. There is also some evidence tending to show, or it is claimed it tends to show that the plaintiff made at this time statements concerning this accident inconsistent with the testimony he gave on the witness-stand, and that is only for the purpose of enabling you to more accurately determine the weight to be given to the testimony given here under oath.

I think that covers all the questions that are involved in this case, as I understand it.

Two verdicts have been prepared and submitted by counsel, one is for the plaintiff, leaving the amount of his recovery blank to be filled in by you,

and the other is a verdict in favor of the defendant, simply a finding to the effect that the jury think that the plaintiff is not entitled to recover anything.

Jury retires.

Mr. ROCKWOOD.—May we have an exception, if your Honor please, to the refusal of the Court to give requested instructions 1, 2, 3, 4 and 4-a?

COURT.—That is the motion for a directed verdict?

Mr. ROCKWOOD.—Specific request to take away certain issues from the jury.

COURT.—You can have your exception, but I might advise you that it will be unavailing because the Circuit Court of Appeals has repeatedly held that instruction must be taken before the jury retires. [338—298]

Mr. ROCKWOOD.—That is what I had reference to when I spoke to you before; I did not care to interrupt the Court.

COURT.—You have the same thing in your motion for a directed verdict, so the matter is probably taken care of. [339—299]

[Title of Court and Cause.]

I, Mary E. Bell, hereby certify that I acted as official stenographer in the trial of the above-named case on Thursday, December 11, 1930, et seq., and took down in shorthand all the proceedings at said trial; and that the foregoing pages, numbered from

2 to 199, inclusive, contain a full, true and correct transcript thereof.

[Seal]

MARY E. BELL,
Notary Public for Oregon.

My commission expires April 11, 1933.

Portland, Oregon, December 30, 1930. [340]

[Title of Court and Cause.]

ORDER ALLOWING BILL OF EXCEPTIONS
AS AMENDED.

The defendant on March 13, 1931, and within the time allowed by the rules and orders of this court, delivered to the Clerk its bill of exceptions and served a copy thereof on the attorneys for the plaintiff, and thereafter on March 17, 1931, within the time allowed by the rules of this court, the plaintiff delivered and served its objections and amendments to defendant's proposed bill of exceptions, and the court having found that the defendant's bill of exceptions, as modified by plaintiff's amendments thereof, is a true and correct statement of the facts therein referred to,—

NOW, THEREFORE, IT IS HEREBY ORDERED that the bill of exceptions presented by the defendant, above referred to, as amended by plaintiff's objections and amendments hereinabove referred to, shall be allowed as the bill of exceptions in this case and shall be filed with the records of this case in the office of the Clerk of this court.

Dated April 3, 1931.

JOHN H. McNARY,
Judge.

Approved.

A. M. DIBBLE,
Of Attorneys for Plaintiff.
FLETCHER ROCKWOOD,
Of Attorneys for Defendant.

Filed April 3, 1931. [341]

AND AFTERWARDS, to wit, on the 14th day of April, 1931, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [343]

[Title of Court and Cause.]

PETITION FOR APPEAL AND SUPERSEDEAS.

To the Honorable JOHN H. McNARY, District Judge, and One of the Judges of the Above-named Court:

Great Northern Railway Company, the defendant in the above-entitled cause, conceiving itself aggrieved by the judgment entered herein on the 16th day of December, 1930, in favor of plaintiff and against defendant in the sum of \$18,480.00, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from said judgment and the whole thereof for the reasons set forth in the assignment of errors which is served and

filed herewith; and said defendant prays that this petition for said appeal may be allowed and that a transcript of the record and of all proceedings upon which said judgment is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and defendant further prays that an order be made fixing the amount of security which the defendant shall give and furnish upon the allowance of said appeal, and that upon the giving of such security all further proceedings in [344] this court be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,
Attorneys for Defendant.

Filed April 14, 1931. [345]

AND AFTERWARDS, to wit, on the 14th day of April, 1931, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [346]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes defendant and files the following assignment of errors upon which it will rely upon the prosecution of its appeal in the above-entitled cause

from the judgment entered herein in favor of plaintiff and against the defendant on the 16th day of December, 1930:

1. The United States District Court in and for the District of Oregon erred in denying the motion of the defendant for a new trial in an arrest of judgment made upon the grounds, among others, that (a) the damages awarded by the verdict of the jury to the plaintiff are excessive and appear to have been given under the influence of passion and prejudice; (b) the evidence at the trial was insufficient to justify the verdict.

2. That the United States District Court in and for the District of Oregon erred in denying the defendant's motion for a directed verdict in its favor made upon the grounds that there was no evidence to support the allegation in the complaint of excessive speed; that there was no [347] evidence to support the allegation contained in the complaint of any excessive or unusual lurch of the train; that the evidence failed to show that the defendant was negligent in any particular alleged with respect to the condition of the vestibule of the car as to lights, opening, or the method of safeguarding the vestibule; that there was no evidence from which it could be determined that any alleged act of the defendant was the proximate cause of the plaintiff's injury, or of the accident and his resulting injury, and that the evidence showed that the plaintiff was guilty of contributory negligence and that such negligence was a proximate cause of the accident.

3. That the United States District Court in and for the District of Oregon erred in refusing to give

to the jury certain instructions requested by the defendant numbered respectively II, III, IV and IV-a reading as follows:

“II.

There is no evidence from which you may find that the speed of the train was excessive and negligent.

“III.

I charge you that there is no evidence presented in this case that there was a lurch of the train at the moment that the plaintiff fell from the train. The entire matter covered by the allegations relating to the lurching of the train is withdrawn from your consideration.

“IV.

I direct you that there is no evidence from which you can find that the defendant was at fault in respect to the condition of the vestibule and the methods used for guarding the open vestibule. Consequently all questions of negligence of the defendant on the condition of the vestibule and the methods used to protect the opening are withdrawn from your consideration.

“IV-a.

I instruct you that there is no evidence in this [348] record from which you can find that the trap-door of the vestibule, at the place where the accident occurred, was raised; in other words, there is no evidence that the steps were uncovered.”

4. That the United States District Court in and for the District of Oregon erred in overruling the objection of the defendant to a question propounded to witness Mrs. Georgia H. Cheney reading as follows:

“Q. And what was the situation there with respect to the vestibule and steps?”

5. That the United States District Court in and for the District of Oregon erred in overruling the objection of the defendant to a question propounded to witness Mrs. J. L. Freck, reading as follows:

“Now, when you went back there, which you say was immediately after this announcement that a Sir Knight had fallen from the train, the train was still in motion and was not yet at Saco, what condition did you find the vestibule of that coach to be in?”

6. That the United States District Court in and for the District of Oregon erred in overruling the objection of the defendant to a question propounded to witness J. O. Freck reading as follows:

“Q. What was the condition of the vestibule there at the rear end of the coach?”

WHEREFORE, defendant prays that said judgment heretofore and on the 16th day of December, 1930, entered in this action against defendant and in favor of plaintiff be reversed and that judgment

be entered in this action in favor of defendant and against plaintiff.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,

Attorneys for Defendant.

Filed April 14, 1931. [349]

AND AFTERWARDS, to wit, on Tuesday, the 14th day of April, 1931, the same being the 34th judicial day of the regular March term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [350]

[Title of Court and Cause.]

MINUTES OF COURT—APRIL 14, 1931—ORDER ALLOWING APPEAL.

The above-named defendant, Great Northern Railway Company, having duly served and filed herein its petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein in favor of plaintiff and against defendant on December 16, 1930, and having duly served and filed its assignment of errors upon which it will rely upon said appeal,—

IT IS ORDERED that an appeal be and is hereby allowed to the United States Circuit Court

of Appeals for the Ninth Circuit from said judgment entered in this action in favor of plaintiff and against defendant on December 16, 1930.

IT IS FURTHER ORDERED that the bond on appeal herein be fixed at the sum of \$21,000.00, the same to act as a supersedeas bond and as a bond for costs and damages on appeal.

Dated April 14th, 1931.

JOHN H. McNARY,
District Judge.

Filed April 14, 1931. [351]

AND AFTERWARDS, to wit, on the 14th day of April, 1931, there was duly filed in said court, an undertaking on appeal, in words and figures as follows, to wit: [352]

[Title of Court and Cause.]

UNDERTAKING ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Great Northern Railway Company, a corporation, as principal, and National Surety Company, a corporation organized and existing under the laws of the State of New York having an office in Portland, Oregon, and being duly authorized to transact business pursuant to the act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety therein," as surety, are held and firmly bound unto W. G. Shellenbarger, in the

full and just sum of Twenty-one Thousand Dollars (\$21,000.00) to be paid to said W. G. Shellenbarger, his executors, administrators or assigns, to which payment well and truly to be made the undersigned bind themselves, their successors and assigns, jointly and firmly by these presents. Upon condition, nevertheless, that

WHEREAS, the above-named Great Northern Railway Company has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment in favor of the above-named plaintiff, W. G. Shellenbarger, made and [353] entered on the 16th day of December, 1930, in the above-entitled action by the District Court of the United States for the District of Oregon, praying that said judgment may be reversed,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named appellant shall prosecute its appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its appeal good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

IN WITNESS WHEREOF, the said principal and the surety have executed this bond this — day of April, 1931.

GREAT NORTHERN RAILWAY COMPANY.

By CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,

Its Attorneys.

NATIONAL SURETY COMPANY,
(Seal of Surety Co.)

By W. B. GILHAM,
Resident Vice-president.

Attest: EVA QUARNSTROM.
(Corporate Seal)

Countersigned:

W. B. GILHAM,
Resident Agent.

The foregoing bond is hereby approved as to form, amount and sufficiency of surety.

JOHN H. McNARY,
Judge of the United States District Court for the
District of Oregon.

Filed April 14, 1931. [354]

—

AND AFTERWARDS, to wit, on the 14th day of
April, 1931, there was duly filed in said court, a
praecipe for transcript, in words and figures as
follows, to wit: [355]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD
ON APPEAL.

To G. H. Marsh, Clerk of the Above-entitled Court:

You will please make up the transcript on appeal in the above-entitled case, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, and you will please include in such transcript on appeal the following and no other papers and exhibits, to wit:

1. Complaint as amended at the trial.
2. Answer of defendant, Great Northern Railway Company.
3. Motion for dismissal as to defendant, Spokane, Portland and Seattle Railway Company.
4. Order of dismissal as to defendant, Spokane, Portland and Seattle Railway Company.
5. Reply to answer of defendant, Great Northern Railway Company.
6. Verdict.
7. Judgment.
8. Motion for a new trial and in arrest of judgment.
9. Order denying defendant's motion for a new trial and in arrest of judgment.
10. Bill of exceptions.
11. Plaintiff's objections and amendments to defendant's proposed bill of exceptions.
12. Order allowing bill of exceptions as amended.
13. Petition for appeal and supersedeas.
14. Assignment of errors.
15. Order allowing appeal.
16. Undertaking on appeal.
17. Citation on appeal.
18. Copy of this praecipe as served upon counsel.

Very respectfully yours,

CHARLES A. HART,

FLETCHER ROCKWOOD,

CAREY, HART, SPENCER & McCULLOCH,

Attorneys for Defendant and Appellant Great Northern Railway Company.

Filed April 14, 1931. [356]

AND AFTERWARDS, to wit, on Wednesday, the 27th day of May, 1931, the same being the 68th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [357]

[Title of Court and Cause.]

MINUTES OF COURT—MARCH 27, 1931—
ORDER RE TRANSMISSION OF ORIGINAL EXHIBITS.

On motion of the defendant the Clerk of this court is ordered to withdraw the original exhibits introduced into evidence in the above-entitled case from the file and transmit said original exhibits to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, together with the appeal papers in this case.

JAMES ALGER FEE,
United States District Judge.

Dated: May 27, 1931. [358]

[Title of Court and Cause.]

CITATION ON APPEAL.

To W. G. Shellenbarger, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at

San Francisco, California, within thirty days from the date hereof, pursuant to a notice of appeal filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Great Northern Railway Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the judgment in said cause should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this — day of April, in the year of our Lord one thousand nine hundred and thirty-one.

JOHN H. McNARY,
Judge. [359]

State of Oregon,
County of Multnomah,—ss.

Due service of the within citation on appeal is hereby accepted in Multnomah County, Oregon, this 14th day of April, 1931, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood, of attorneys for defendant.

MALARKEY, DIBBLE & HERBRING,
Attorneys for Plaintiff.

Filed Apr. 14, 1931. [360]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do

hereby certify that the foregoing pages, numbered from 2 to 358, inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which W. G. Shellenbarger is plaintiff and appellee and Great Northern Railway Company, a corporation, is defendant and appellant; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant, and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$33.80, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 28th day of May, 1931.

[Seal]

G. H. MARSH,
Clerk. [361]

[Endorsed]: No. 6482. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, Appellant, vs. W. G. Shellenbarger, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed June 1, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.